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Supreme Court, U.S.
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Supreme Court of the United States

MELISSA HARMAN AND JUSTIN OVERTON, PETITIONERS

v.

BRENT POLLOCK, OFFICER, DEPARTMENT OF PUBLIC SAFETY, STATE BUREAU OF INVESTIGATIONS, SALT LAKE CITY, UTAH; AND SCOTT BARNETT, OFFICER, DEPARTMENT OF PUBLIC SAFETY, STATE BUREAU OF INVESTIGATIONS, SALT LAKE CITY, UTAH

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where police officers know immediately upon entry of petitioners' home that it is *not* the "garage" identified in the search warrant, did the subsequent detention of petitioners and two searches of their home violate petitioners' Fourth Amendment rights?

2. Is the majority decision below in irreconcilable conflict with the decisions of every circuit court which has considered the holding of *Maryland v. Garrison*, 480 U.S. 79(1987)?

3. The majority's reasoning credits one story rather than another about the way the police executed the search warrant. By choosing to believe one story which seeks to exculpate the police to the exclusion of sworn testimony which triggers *Garrison's* safeguards, did the majority abuse Rule 56's decisionmaking procedure, depriving petitioners of a jury trial on material fact issues central to their claim?

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The published opinion of the United States Court of Appeals for the Tenth Circuit in *Melissa Harman and Justin Overton v. Brent Pollock et al.*(C.A. No. 04-4294), decided May 2, 2006, and reported at 446 F.3d 1069(10th Cir. 2006), affirming in part and reversing in part the District Court's grant of a qualified immunity to respondent police officers in this civil rights action for damages, remanding same to the District Court for further proceedings, is set forth in the Appendix hereto (App. 77-118).

The unpublished Memorandum Decision and Order of the United States District Court for the District of Utah, Central Division, in *Melissa Harman and Justin Overton v. Brent Pollock et al.*(Civil Action No. 2:03CV558 DAK), decided March 18, 2008, granting respondent police officers' summary judgment motion on the basis of their qualified immunity from suit for damages under 42 U.S.C. § 1983, is set forth in the Appendix hereto(App. 39-76).

The published opinion of the United States Court of Appeals for the Tenth Circuit in *Melissa Harman and Justin Overton v. Brent Pollock et al.*(C.A. No. 08-4068), filed November 18, 2009, and reported at 586 F.3d 1254(10th Cir. 2009), affirming in a majority opinion the District Court's grant of respondent police officers' summary judgment motion on account of their qualified immunity from suit for damages under 42 U.S.C. § 1983, is set forth in the Appendix hereto(App. 1-38).

The unpublished order of the United States Court of Appeals for the Tenth Circuit in *Melissa Harman and Justin Overton v. Brent Pollock et al.*(C.A. No. 08-4068), filed on December 30, 2009, denying petitioners' timely filed petition for rehearing or for rehearing *en banc* is set forth in the Appendix hereto(App. 119-120).

JURISDICTION

The decision of the Tenth Circuit Court of Appeals affirming in a majority opinion the District Court's grant of respondent police officers' summary judgment motion on account of their qualified immunity from suit for damages under 42 U.S.C. § 1983, was entered on November 18, 2009; and its order denying petitioners' timely filed petition for rehearing or for rehearing *en banc* was filed on December 30, 2009(App. 1-38;119-120). This petition for writ of certiorari is filed within ninety (90) days of the date the court of appeals denied petitioners' timely filed petition for rehearing or for rehearing *en banc*. 28 U.S.C. § 2101(c). Supreme Court Rule 13.3. The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

United States Constitution, Amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon

> probable cause, supported by Oath, or affirmation, and particularly describing the place to be searched, and the persons or things to be seized

United States Constitution, Amendment V:

> No person shall...be deprived of life, liberty, or property, without due process of law....

United States Constitution, Amendment VII:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

United States Constitution, Amendment XIV, Section 1:

> ...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny o any person within its jurisdiction the equal protection of the laws.

28 U.S.C. Section 1331:

> The district courts shall have original jurisdiction of all civil actions arising under the

Constitution, laws, or treaties of the United States.

28 U.S.C. Section 1343(a)(3) & (4):

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

...

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

Civil Rights Act–42 U.S.C. § 1983:

Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to he deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injure in an action at law, suit in equity, or other proper proceeding for redress....

Civil Rights Act–42 U.S.C. § 1986:

> Every person who, having knowledge that any of the wrongs conspired to be done..., are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses to do so, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented....

Fed. R. Civ. P. 56(c) and (e)(2):

> **(c). Serving the Motion; Proceedings.**
> ...The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.
> ....
> **(e)(2). Affidavits; Further Testimony.**
> ...*Opposing Party's Obligation to Respond.* When a motion for summary judgment is properly made and supported, an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must—by affidavits or as otherwise provided in this rule—set out specific facts showing a genuine issue for trial. If the opposing party does not so respond,

summary judgment should, if appropriate, be entered against that party.

STATEMENT

During the summer of 2002, the Utah State Bureau of Investigation ("SBI") began investigating illegal drug activity involving heroin and cocaine in the Salt Lake City area by two Hispanic individuals known as Isabel, a female, later identified as Conception Rodriquez, and a male known as Pawoo, later identified as Ignacio Ascention(App. 3;43). Respondent Trooper Brent Pollock ("Pollock" or "respondent") was assigned as the case agent on this investigation and respondent Sergeant Scott Barnett ("Barnett" or "respondent") was his immediate supervisor(App. 3;43). Working undercover, Pollock contacted Isabel through a confidential informant and made several controlled drug buys of heroin or cocaine from both Isabel and Pawoo(App. 43;79).

Isabel and Pawoo are of Hispanic origin, in their late 20's, and of short stature, between 5'5" and 5'6" in height. During some of the drug buys by Pollock, Isabel had small children with her(App. 43). Eventually, after some of these drug transactions, Pollock and other SBI agents trailed these suspects back to their small home located at 44 West 2700 South ("44 West") in South Salt Lake City, Utah(App. 43;79). The property encompassed not only their home but also a small, detached outbuilding at the side and to the rear of the house at 44 West(App. 44;79-80).

Surveillance of this property at 44 West by SBI agents ensued and by January of 2003, SBI agents noticed this small detached structure at the side and to the rear of 44 West(App. 79-80). Pollock's surveillance revealed that Isabel and Pawoo only entered into and exited from the principal residence at 44 West(App. 79). They drove exclusively either a silver Geo Tracker or a black Oldsmobile Cutlass (App. 79). There were other vehicles parked at the property but surveillance showed that neither Isabel nor Pawoo used any of these automobiles(App. 79). SBI agents also noticed that there were *two* mailboxes on the front of the main residence(App. 96). There was also a single mailbox on the outbuilding at the rear(App. 96).

As SBI's surveillance of 44 West continued during January of 2003, Pollock asked another SBI agent (Joe Gomez) to run a search on the property and the residents of the home(App. 44;79-80). Even though there were *two* mailboxes on the front of the house at 44 West and a detached outbuilding at the side and to the rear of 44 West displaying its own mailbox, in Gomez's investigation of the ownership of the property, neither he nor Pollock was aware of the separate address at **44 1/2** West(App. 44). However, if Gomez had looked at the property's Deed of Trust, he would have discovered that it describes the property as having *two* addresses: 44 West and 44 1/2 West(App. 80-81;96). Furthermore, Gomez's investigation did not discover that there was a separate gas account with Questar for 44 1/2 West since 1996; that the U.S. Postal Service database has a record of a separate address at 44 1/2 West 2700 South; and that the phone company regularly sends its bills to 44 1/2 West(App. 96).

By the time Gomez started investigating this property and its ownership in January of 2003, petitioners Melissa Harman and Justin Overton ("Harman," "Overton" or "petitioners") had just begun to rent as their home the apartment located in the detached outbuilding next to 44 West with an address of 44 1/2 West 2700 South in South Salt Lake, Utah(App. 3). Harman was 19 years old and Overton was 21 years of age; both are Caucasian and 5'10" and 6'1" tall, respectively. Neither bore any physical resemblance to Isabel or Pawoo and neither one had been identified in SBI's seven-month-long investigation as suspects as neither had been observed having any contact whatsoever with Isabel or Pawoo, the targets of this investigation.

Gomez's incomplete search of the ownership of the property at 44 West discovered that one James Tucker owned the locus and rented it out to tenants(App. 44;80). The gas records with Questar for the property which Gomez did find listed Harman as the account holder for 44 West and she had a New Mexico's driver's license and some credit activity in New Mexico(App. 44;80). The Salt Lake County Recorder's Office listed 44 West as a single family dwelling which included a detached structure, one built in 1954 and containing a "finished main floor," built in 1963(App. 80). As the records of the County Assessor showed, 44 West was actually *two* separate lots of land "divided roughly in the middle"(App. 80). Despite evidence that the property consisted of *two* separate lots and showed *three* separate mailboxes, two on the principal residence and one on the outbuilding, neither

Pollock nor Gomez viewed these facts as proof of a second residence at 44 1/2 West(App. 44;80-81).

As for Harman's status as the payor for the gas service at 44 West, Pollock recalled seeing a white vehicle with New Mexico plates in the driveway of 44 West(App. 44;81). While Pollock did not think that Harman was the woman he had been investigating for trafficking in heroin and cocaine, after seeing the vehicle with New Mexico plates at 44 West, he "just assumed that it was [Harman's] vehicle"(App. 81). Despite these inconsistencies in his investigation, Pollock did not run a check on these plates nor did he instruct anyone to do so(App. 81). Gomez's check of Harman's criminal history came back negative (App. 44;81). Gomez also found two other individuals who were associated with 44 West (Benjamin Paul and William Fawcett) and they both had histories of felonies involving violence(App. 81).

Given this investigation and his prior drug transactions with Isabel and Pawoo, Pollock drafted an affidavit supporting his proposed search warrant for the property(App. 44-45;81). His affidavit described Isabel as an Hispanic female with red hair and brown eyes and Pawoo as an Hispanic male with black hair and brown eyes(App. 81). Pollock conferred with the District Attorney about his affidavit and asked about searching the "garage" or outbuilding(App. 81-82). The District Attorney asked Pollock if there were any indicia that this outbuilding was a second residence on the property such as separate address numbers or a separate mailbox(App. 82). Pollock responded that he

was "not aware of any indicia of a second residence"(App. 82).

On February 4, 2003, Pollock submitted a proposed search warrant and affidavit to a judge for the State of Utah(App. 82). Pollock's affidavit contained the following description of the property to be searched:

> 44 West 2700 South, South Salt Lake City, Utah, a white house, brown roof, front door faces south, small wood fence, to the west of the door across the front, #44 on the wall to the right of the front door, *a detached garage to the rear of the house on the east side.*

(App. 44-45;82)(emphasis in original).

The judge issued the search warrant on February 4, 2003(App. 82). The warrant description of the property to be searched was identical to Pollock's affidavit and authorized police officers to search the property "including any and all outbuildings and curtilage of the property"(App. 82).

Concerned about the violent backgrounds of two individuals (Benjamin Paul and William Fawcett) who might be living at the property, Pollock sought the assistance of the Utah Highway Patrol's Special Emergency Response Team ("SERT team") in executing the search warrant(App. 45-46;83). The Highway Patrol SERT team is the equivalent of a SWAT team(App. 45-46;83).

Three members of the SERT team conducted their own investigation of the property prior to executing the warrant(App. 46;83-84). During their surveillance, they saw a light next to the door to the outbuilding; they saw lights turned on there at night; they heard voices coming from the outbuilding at one point; they observed individuals coming and going from this structure; and they saw sometimes up to seven vehicles parked outside 44 West,(App. 46;96). During this surveillance, this scout team apparently failed to apprehend that this outbuilding had pipes coming from its roof, bespeaking a residence, not just a garage or outbuilding(App. 96). This rear building also had a door and window which appeared residential; and it had its own black metal mailbox next to the lighted door, signifying a separate mail delivery and a separate residence(App. 96). They told Pollock about their concern that someone was using the outbuilding as a residence(App. 83-84;96).

Pollock told Barnett about the SERT team's concern and Barnett advised Pollock to contact the District Attorney's office(App. 46;83). Pollock responded that he had already done so and that he was told by the District Attorney the outbuilding could be legally searched pursuant to the search warrant(App. 83-84). Pollock then told the scout team that he had confirmed that there was only one residence on the property(App. 84).

The SERT scout team then contacted the City of South Salt Lake and reviewed a plat map(App. 84). They confirmed with "City staff" that there was only one address for the property and that it was zoned as a

single residence(App. 84). However, an operations order prepared by the SERT team listed the dwelling to be searched under the warrant as a "Single Family Dwelling with detached Garage/*Residence*"(App. 84-85)(emphasis supplied).

As Officer Donovan Lucas of the SERT scout team later testified at his deposition, the term "garage/residence" was used because the team members "weren't sure" whether someone was living there(App. 84). As he conceded, "if there's a secondary address on [the warrant], then we really shouldn't execute the continuation of the warrant"(App. 84). In fact, the SERT team's operations order referred to the outbuilding as "residence #2" in their plan to secure and clear "the residences" when executing the warrant(App. 85).

At approximately 12:30 AM on February 12, 2003, Pollock and Barnett met with the SERT team at a location near the property and then waited there while the teams executed the warrant(App. 85). The SERT team divided into two units and each simultaneously entered 44 West and the outbuilding at 441/2 West(App. 46;86). To enter the apartment at 441/2 West, the team broke through a rear window and also entered through a side door, using a ram to force open the door(App. 46;86). Team members swarmed the apartment with their weapons drawn(App. 46;86).

Petitioners were sleeping unclothed on a mattress on the floor when the invasion of 441/2 West began(App. 46;86). Harman was wearing only a thong and Overton was naked(App. 86). The officers saw

immediately that this "garage" or outbuilding was furnished with a kitchenette, a bathroom, a couch, a television, and a separate bedroom with a mattress on the floor(App. 46;86). They also observed marijuana and a pipe in plain view on the kitchen counter(App. 46;86). SERT officers then handcuffed petitioners, sat them on the couch, gave them a single bedsheet to cover themselves and searched the premises(App. 46;86). Petitioner Harman was so terrified by these events that she urinated on herself; but she was not allowed to clean herself, only to cover herself with a bedsheet (App. 46;86).

At some point, Pollock and Barnett arrived on the scene to interview the suspects, Barnett going first to the principal residence at 44 West(App. 46;86). When he entered petitioners' home at 441/2 West, he saw petitioners handcuffed on the couch and, noting the kitchen and counter, believed immediately that this outbuilding could be a separate residence, *not* the "garage" listed in the warrant (App. 86). He wasn't sure petitioners were involved in the "drug ring" under investigation but despite his doubts, he returned to 44 West to assist the processing of the suspects there, leaving petitioners handcuffed to the couch, still naked and covered by only a bedsheet while a search of their home took place(App. 47;86).

After an hour of petitioners sitting handcuffed on the couch in the cold February air, the officers helped them dress and moved them to a van holding suspects from 44 West for questioning (App. 47;87). Pollock then entered their home, again searched the home for drugs and weapons with a K-9 unit and

confiscated the marijuana and pipe as evidence(App. 47;87). Barnett spoke to each petitioner for about fifteen to twenty minutes; Harman repeatedly asked to see the search warrant without success(App. 87). Both petitioners told Barnett that they had moved into the residence at 441/2 West a few weeks earlier and were not involved with the drug trafficking at 44 West(App. 48;87). Upon the completion of these interviews, Barnett "felt certain" that 441/2 West was a separate residence(App. 87).

Barnett then told the police scene commander that petitioners were not involved in the drug trafficking at 44 West(App. 48;87). Petitioners were given citations for possession of marijuana and paraphernalia and were released at about 2:35 AM(App. 48;87). Petitioners went to a nearby hotel because their apartment was not habitable(the window and the door were broken and it was in the middle of winter). Petitioners were in police custody somewhere between two and four hours(App. 48;87). Petitioners met with Barnett on February 13, 2003, to obtain a copy of the search warrant and to find out why they had been subject to a search of their home.

Upon these operative facts, petitioners brought this civil rights action on July 23, 2003, against the respondents Pollock and Barnett in the United States District Court for the District of Utah(App. 4;41;88). Alleging most the facts described above and invoking the jurisdiction of the federal court pursuant to 28 U.S.C. §1343(a) and 42 U.S.C. §1983, petitioners sought damages from Pollock and Barnett for the constitutional injuries they sustained when these

officers, acting under color of state law, violated their Fourth Amendment rights to be free from unreasonable searches and from unreasonable detentions(App. 4;88).

Upon cross motions for summary judgment, the District Court, Campbell, J., ruled that respondents were entitled to qualified immunity from petitioners' suit because (1) their entry into their apartment was objectively reasonable and (2) the subsequent detention of petitioners was also reasonable(App. 41-42). Upon petitioners' appeal, the Tenth Circuit affirmed in part, reversed in part and remanded the matter for further proceedings(App. 77-118). It ruled that the search warrant itself was not rendered invalid by the factual inaccuracies it contained resulting from Pollock's omissions and unreasonable inferences; that it did not misstate or omit material information; and that although the question was "close," neither Pollock nor Barnett acted unreasonably in initially entering 441/2 West on the information available to them(App. 91-100).

However, the Tenth Circuit concluded that material fact questions exist as to whether the officers, upon realizing the mistaken execution of the warrant, acted reasonably in their subsequent search of petitioners' home and their detention of petitioners(App. 101-116). Relying upon *Maryland v. Garrison*, 480 U.S. 79(1987), the court of appeals concluded that

> [q]ualified immunity does not provide a safe harbor for police to remain in a residence after they are aware that they have entered the

> wrong residence. A decision by [police] to remain in a residence after they realize they are in the wrong house crosses the line between a reasonable mistake and affirmative misconduct that traditionally sets the boundaries of qualified immunity.

(App. 107 quoting *Simmons v. City of Paris*, 378 F.3d 476, 481(5th Cir. 2004)).

As the court noted, from the time he entered petitioners' home, Barnett admitted that he did not suspect either one of them to be part of the drug investigation and yet decided first to question the suspects at 44 West instead; both Pollock and Barnett had ample notice that 441/2 West may have been a separate residence; and neither petitioner resembled any target described in the warrant or the underlying affidavit(App. 107-108). The reasonableness of the officers' delay in realizing that they were in a separate residence not anticipated by the warrant and whether the full scale search of petitioners' home took place after they should have realized their mistake remained material facts in dispute and precluded summary judgment on the question of the officers' liability not only for the two searches of petitioners' home but also for their lengthy detention of petitioners while those searches took place(App.107-110).

Nor did the court of appeals believe that the small amount of marijuana seen in petitioners' home could justify full scale searches of the premises or petitioners' lengthy detention(App.110-116). The small amount of marijuana did not suggest drug trafficking,

was not a drug specified in the affidavit supporting the warrant (cocaine and heroin) and was not tied to Barnett's questioning of petitioners(App. 114). Even Barnett admitted that from the time he entered their home, he did not suspect that petitioners were part of the cocaine and heroin enterprise at 44 West he was investigating(App. 110-114).

Additional discovery took place on these material fact issues in the district court and again the parties filed cross motions for summary judgment(App. 39-40). On March 18, 2008, the District Court, Kimball, J., granted respondents' motion based on qualified immunity(App. 39-76). Analyzing respondents' conduct exclusively under the standard of *Terry v. Ohio*, 392 U.S. 1(1968) rather than *Maryland v. Garrison, supra*, the motion judge determined *inter alia* that respondents' search of petitioners' home and their subsequent detention of petitioners even after discovering that it was not the premises anticipated by the search warrant was objectively reasonable under *Terry* (App. 49-73). It concluded that the officers were entitled to a qualified immunity because there was no clearly established law prohibiting their conduct(App. 49-73).

Petitioners appealed and a majority of the court of appeals affirmed the district court but on different grounds(App. 1-38). Rejecting the lower court's *Terry's* analysis and reinstating *Garrison's* framework, the majority ruled that although it was a "close" question on this record, the officers' reasonable belief that the petitioners' home served as a "crash pad," coupled with their plain view sighting of the marijuana and pipe,

justified petitioners' detention and two searches of their home "because the officers had not confirmed the [petitioners] were not connected to the illegal activity in the main house until all of...Barnett's interviews were complete which were *nearly* two hours after the initial intrusion"(App.13-16).

To reach this result, the majority *found credible* respondents' new "crash pad" theory to justify their actions, i.e., their belief that occupants of the main house at 44 West were using petitioners' apartment at 441/2 West to use and store drugs; that Harman actually lived in the main house and that she had just gone out to the "garage" temporarily to "party;" and that even though Harman was not a known character in this drug enterprise involving only Hispanic-appearing suspects, she was "somehow intertwined in this"(App. 13-15). In addition, it *found believable* Barnett's assertion that it was only *after* interviewing petitioners that he realized that there were two separate "units," that petitioners were not part of the drug dealing operation at the main house and that the warrant was overbroad(App. 15-16). Calling this realization by the police objectively reasonable under "the unique facts of this case," the majority ruled that *Garrison's* safeguards were not triggered(App. 16).

Buttressing this conclusion, the majority again *credited* the officers' assertion that when SERT officers first saw the marijuana and when Pollock and Barnett first entered petitioners' home and saw the marijuana, they still reasonably believed that petitioners were connected to the illegal activity in the main house. According to the majority, this avoided any duty to

retreat under *Garrison* and made the marijuana part of the evidence to support the detention of petitioners and the two searches of their home(App. 17-19).

Circuit Judge Lucero dissented(App. 26-38). He objected to the majority's refusal to adhere to *Garrison's* holding, in fact distorting *Garrison's* rationale to such an extent that a circuit split on its meaning had been created(App. 26;30-31). He also objected to the majority's shaving of the evidence on summary judgment to favor the police while failing to give the evidence adduced by petitioners the deference it deserved. This unfairly distorted the material fact issues in dispute under Rule 56 and denied petitioners a jury trial on their claims(App. 28-30).

Judge Lucero noted the uncontested evidence that the SERT team knew immediately upon breaking down the door that they were not in a "garage"(App. 28-30). The "[i]nvestigating officers and SERT members executing the warrant overwhelmingly testified that [petitioners' home] was clearly an apartment" *before the initial search even began*(App. 28-30). Respondents' "crash pad" theory ignores this overwhelming proof and, as the dissent observed, while a jury might be free to credit respondents' explanation, the court could not(App. 30). Instead, applying summary judgment jurisprudence and viewing the evidence in the light most favorable to petitioners, the court was bound to assume that "it was 'obvious' that [petitioners'] home was an apartment and that this fact was clear to law enforcement as soon as they broke down the door"(App. 30).

More important, the dissent thought the majority's treatment of *Garrison* "stands [this decision] on its head:"

> What *Garrison* requires is for officers to "discontinue the search" once they were "put on notice of the risk that they might be in a unit erroneously included within the terms of the warrant," [480 U.S. at 87]; the majority instead rules that henceforth officers may detain individuals and continue the search of a home erroneously included in a warrant until the detainees can prove to the officers that they are "unconnected to the illegal activity described in the warrant." In other words, my colleagues require [petitioners] to satisfy police that their separate apartment was not serving as a "crash pad"for their drug dealing neighbors before a search and detention need be ceased. That is simply not the standard under clearly established Fourth Amendment law. And it is not the state of affairs that should be allowed to exist under our Constitution.

(App. 31). Because respondents could point to no facts which provided probable cause to search petitioners' home, the dissent concluded that the searches and detention were unconstitutional(App. 33-34).

On December 30, 2009, the court of appeals denied petitioners' timely filed petition for rehearing or for rehearing *en banc*(App. 119-120). Judge Lucero would have granted the petition for panel rehearing(App. 119).

REASONS FOR GRANTING THE PETITION

1. The Majority's Decision Undermines *Garrison*'s Holding That Once Police Realize That They Are Mistakenly Searching The Wrong Property, They Must Immediately Withdraw And Abandon Their Search.

Petitioners' right to privacy in their own home implicates the central concern of the Fourth Amendment----the concern about giving police officers "unbridled discretion to rummage at will among a person's private effects." *Arizona v. Gant*, 556 U.S. __, __ & n. 5; 129 S.Ct. 1710, 1720 & n.5(2009)(Stevens, J.). The Court's decision in *Maryland v. Garrison*, 480 U.S. 79, 84-88(1987) establishes the procedure for law enforcement officials to follow in circumstances where there is a risk that the property searched is not included in the warrant so that petitioners' privacy rights are protected. In order to have some regard for the often fast-paced reality which police face when executing a warrant and to acknowledge that honest mistakes on their part may happen, *Garrison* measures the constitutional validity of their conduct "in light of the information available to them at the time they acted." *Id.* at 85.

With specific application to the facts of this case, *Garrison* holds that if the police know, or should have known, that petitioners' home adjacent to the residence to be searched was not a "garage" as listed in the warrant but rather a residence----and thus became aware of the error in the warrant's description of this outbuilding-----they were obligated immediately to

abandon their search of 441/2 West, limiting it to just 44 West, as described in the warrant. *Id.* at 86-87. In other words, once the police officers recognize the warrant's error of fact, they were "put on notice of the risk that they might be in a [home] erroneously included within the terms of the warrant," *id.* at 87, and were required immediately to leave and discontinue their search of petitioners' home.

As the *Garrison* Court explained, the officers' conduct and the limits of the search are based on the information available to the officers as the search proceeds; and if the officers have not yet discovered their factual mistake, they may proceed to search, detain and come upon contraband legally, if their factual mistake was reasonable. *Id.* at 87-88. However, as the sworn testimony of the investigators and SERT members overwhelmingly established below, *the police officers knew immediately upon entry to petitioners' home that this was not the "garage" described in the warrant.*

Given this material fact, *Garrison's* holding is triggered: "It is only after the police begin to execute the warrant and set foot upon the described premises that they will discover the factual mistake and must reasonably limit their search accordingly," i.e., discontinue the search and withdraw from petitioners' home. *Id.* at 89 n.14. Respondents' refusal to do so in the circumstances before them----in fact, to *detain* petitioners for at least two hours while they twice searched their property for drugs----is at the core of petitioners' constitutional injury under §1983. Detaining persons in a home incident to conducting a

lawful search of the premises for contraband is permitted, *Michigan v. Summers*, 452 U.S 692, 705(1981); but once *Garrison's* safeguards are triggered, once the police become aware of the risk that they are in a home not described in the warrant, the search if not discontinued becomes illegal and cannot justify petitioners' continued detention. *Id.*

The majority's decision dramatically alters *Garrison's* calculus and undermines its core prophylactic safeguards for protecting Fourth Amendment freedoms. In the first place, it makes the police officers' duty to abandon their search of a home depend *not* on their realization of the risk that they are in a residence which was mistakenly included in the search warrant but rather on the dramatically looser showing that the home's residents are unconnected to the illegal activity described in the warrant. Such a a rationale gives police officers "unbridled discretion to rummage at will among a person's private effects," *Arizona v. Gant*, *supra*, while they allegedly investigate petitioners' "connection" to the illegal activity described in the warrant.

By this shift to a new "unconnected" formula, the majority dilutes *Garrison's* standard of discontinuing a search as soon as the police discover their mistake. The proposed new standard is one which permits the police, even after realizing their mistake, to remain in the home, detain its residents and investigate further. Thus if police officers allegedly believe that one's home is a "crash pad" that is used to store and use drugs connected with some other property—yet fails to list this "crash pad" in the search warrant—it may still

without a warrant search the home and detain its occupants while its investigation proceeds. Moreover, police officers may search a property and detain its occupants---even though neither the property nor the residents were described in the warrant---as long as they have a suspicion that its occupants were somehow involved in nearby illegal activity, until they rule out the possibility of a connection.

This ruling unravels *Garrison* in every essential respect and provides law enforcement with the unfettered discretion to determine when petitioners' Fourth Amendment rights in their own home begin and end. As Judge Lucero rightly concluded in his dissent, this "is simply not the standard under clearly established Fourth Amendment law...[a]nd it is not the state of affairs that should be allowed to exist under our Constitution"(App. 31).

Here "[i]nvestigating officers and SERT members executing the warrant overwhelmingly testified that [petitioners'] dwelling was clearly an apartment," *not* the garage listed in the warrant; and they did so immediately or "within a few seconds" of when they broke down the door---and *before* they saw the small amount of marijuana and pipe in plain view. Respondents were therefore required by *Garrison* to discontinue their search. Their failure to do so is constitutional injury for which petitioners are entitled to redress by a jury trial. The majority's reasoning otherwise dramatically undermines *Garrison* and justifies the grant of certiorari in order to reestablish *Garrison's* safeguards when police officers come upon

property, especially a residence, not identified in the search warrant.

2. The Majority's Decision Is In Irreconcilable Conflict With Every Circuit Which Has Considered *Garrison's* Holding.

Garrison requires that police discontinue and abandon their search as soon as they become aware of facts that the property being entered or searched *might* not be one anticipated by the warrant. The summary judgment record below showed that, viewed in the light most favorable to petitioners, the "[i]nvestigating officers and SERT members executing the warrant overwhelmingly [believed] that [petitioners'] dwelling was clearly an apartment" and *not* the garage identified in the warrant immediately or "within a few seconds" of when they broke down the door to petitioners' home.

The majority decision holds nonetheless that henceforth police officers may still detain petitioners, non-target persons, and twice search their home which was erroneously included in the warrant; and the officers may continue the detention until the detainees can prove that they are unconnected to the illegal activity described in the warrant. That is, police officers absent exigent circumstances may search a property and detain its occupants----even though neither the property nor the persons were described in the search warrant----until they rule out the possibility that its residents are connected in some way to the illegal activity described in the warrant. This ruling not only emasculates *Garrison's* prophylactic safeguards founded on core Fourth Amendment values but also

places the jurisprudence of the Tenth Circuit Court of Appeals on this issue in irreconcilable conflict with every circuit court of appeals which has considered *Garrison's* reach, including its own prior decision in this case.

The courts of appeal for the First Circuit (*U.S. v. Ricciardelli*, 998 F.2d 8, 17(1st Cir. 1993); Third Circuit (*U.S. v. Ritter*, 416 F.3d 256, 266-267(3rd Cir. 2005); Fourth Circuit (*Mazuz v. Maryland*, 442 F.3d 217, 227(4th Cir. 2006); Fifth Circuit (*Simmons v. City of Paris*, 378 F.3d 476, 479-480(5th Cir. 2004); Sixth Circuit (*Pray v. City of Sandusky*, 49 F.3d 1154, 1159-1160(6th Cir. 1995); Seventh Circuit (*Jacobs v. City of Chicago*, 215 F.3d 758, 767(7th Cir. 2000); Eighth Circuit (*U.S. v. Schroeder*, 129 F.3d 439, 442-443(8th Cir. 1997); and Ninth Circuit (*U.S. v. Cannon*, 264 F.3d 875, 879-880(9th Cir. 2001) all read *Garrison* to mean that as soon as police are put on notice of the risk that they might be in the wrong residence, i.e., one erroneously included in a warrant, they are required without qualification to discontinue their search immediately.

Moreover, the Tenth Circuit in its own prior decision in this same case, *Harman v. Pollock*, 446 F.3d 1069, 1083-1086(10th Cir. 2006)(App.101-108), read *Garrison* consonant with these other circuits. It remanded petitioners' claims back to the district court for further discovery to resolve whether and when respondents first realized the risk that they might be in the wrong residence, i.e., one erroneously included in the warrant as a "garage." *Id.* The majority's reasoning and decision in this case is therefore at odds with the

Tenth Circuit's own prior pronouncements in this and other cases about *Garrison's* holding. See, e.g., *Peterson v. Jensen*, 371 F.3d 1199, 1203(10th Cir. 2004).

The Court should therefore grant certiorari in order to resolve this important inter-circuit and intra-circuit conflict concerning *Garrison's* holding.

3. By Choosing To Credit Upon Summary Judgment Only Evidence Which Favors The Police and Ignoring Crucial Proof By Petitioners Which Triggers *Garrison's* Safeguards, The Majority Distorted Rule 56's Decisionmaking Procedure. This Deprived Petitioners Of A Jury Trial On Material Fact Issues Central To Their Claims.

This Court has enunciated two core principles attendant to the resolution of a motion for summary judgment under Rule 56. First, in construing the materials adduced by the parties incident to respondents' summary judgment motion, both the district judge and the court of appeals were bound to draw all reasonable inferences from these materials *against* respondents as the moving parties and *in favor* of petitioners as the non-moving parties. Second, they were further required to resolve all credibility questions *in favor* of petitioners, the non-moving parties, because the role of the courts is only to determine whether there is a genuine issue of material fact for trial and only a trial judge or a jury may properly determine who is credible. *Beard v. Banks*, 548 U.S. 521, 529-530;534(2006). *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150-151(2000). *Anderson v. Liberty Lobby*, 477 U.S. 242, 249-255(1986).

The majority failed to adhere to these two principles. It construed the summary judgment materials *against* petitioners instead of in the light most favorable to them; and rather than drawing all inferences from this material *against* respondents as the moving parties, the majority endowed respondents' evidence with a credibility out of all proportion to its present worth. It *found credible* respondents' new "crash pad" theory, i.e., their belief that occupants of the main house at 44 West were using petitioners' apartment at 441/2 West to use and store drugs; that Harman actually lived in the main house and that she had just gone out to the "garage" temporarily to "party;" and that even though Harman was not a known character in this enterprise involving only Hispanic-appearing suspects, she was "somehow intertwined in this"(App. 13-15). It also *found believable* Barnett's claim that it was only *after* interviewing petitioners that he realized that there were two separate "units," that petitioners were not part of the drug dealing operation at the main house and that the warrant was overbroad(App. 15-16). Calling this realization by the police objectively reasonable under "the unique facts of this case," the majority ruled that *Garrison's* safeguards were not triggered(App. 16).

The majority also *credited* the officers' assertion that when SERT officers first saw the marijuana and when Pollock and Barnett first entered petitioners' home and saw the marijuana, they still reasonably believed that petitioners were connected to the illegal activity in the main house, thereby avoiding any duty to retreat under *Garrison* and making the marijuana

part of the evidence supporting their detention of petitioners and the two searches of their home(App. 17-19). Thus the majority justified respondents' two searches and their detention of petitioners "because the officers had not confirmed [petitioners] were not connected to the illegal activity in the main house until all of...Barnett's interviews were complete which were nearly two hours after the initial intrusion"(App. 16;18-19;21;22).

This is an overly generous treatment of respondents' proof by the majority. It ignores entirely petitioners' probative, material evidence----identified by the dissent---- that "[i]nvestigating officers and SERT members executing the warrant overwhelmingly testified that [petitioners'] dwelling was clearly an apartment" and that they realized that this dwelling was *not* the garage listed in the warrant immediately or "within a few seconds" of when they broke down the door----and *before* they saw the small amount of marijuana and pipe in plain view(App. 28-30).

Even on its *de novo* review of this summary judgment ruling, the majority was not free to credit one story rather than another about the way the police executed the search warrant. By choosing to believe one version of events which exculpates the police to the exclusion of sworn testimony of several police officers which triggers *Garrison's* safeguards, the majority distorted Rule 56's decisionmaking procedure, depriving petitioners of a jury trial on material fact issues central to their claim.

This distortion of the Rule 56 procedure invokes the Court's power of superintendency over the federal courts and the federal system in order to reassert the lower courts' proper role in deciding summary judgment motions. This requires the Court to reaffirm the holdings of *Beard*, *Reeves* and *Anderson* which require courts to draw all reasonable inferences in favor of the party opposing the motion for summary judgment and to refrain from making credibility determinations in order to resolve material factual disputes because this is a function of a jury, not a judge. *Beard v. Banks*, 548 U.S. at 555 (Ginsburg, J., dissenting).

This unfair summary judgment analysis by the majority also works a denial of petitioners' right to a jury trial on the merits of their claims. The seventh amendment to the federal constitution provides that in suits at common law, "the right of trial by jury shall be preserved...." As Justice Scalia observed in *Blakely v. Washington*, 542 U.S.296, 305-306(2004), the right to a jury trial in civil cases is not a procedural formality but rather a fundamental "reservation of power in our constitutional structure," assuring the people's ultimate control of the judiciary. *Id.* citing 2 *The Complete Anti-Federalist* 315, 320(H. Storing ed.1981). This guaranty of a jury trial in the Constitution and the common law traditions it entrenches "do not admit the contention that facts are better discovered by judicial inquisition than by adversarial testing before a jury."*Id.* at 313 citing 3 Blackstone, *Commentaries*, at 373-374; 379-381.

Since one of the fundamental duties of the jury in civil cases is to resolve factual disputes bearing on

material issues in controversy, the summary judgment procedure contained in Rule 56 does not violate a party's constitutional right to a jury trial. It is presumed that if the entry of summary judgment is appropriate, there are no genuine issues of material fact for trial and therefore no right to a jury trial is implicated. *Fidelity & Deposit Co. v. United States*, 187 U.S. 315, 320 (1902). See also *Pease v. Rathbone-Jones Eng. Co.*, 243 U.S. 273, 278-279(1917).

However, both federal jurists and legal commentators have noted that federal courts regularly abuse summary judgment procedure in order to take triable cases away from juries. See Hon. W.G. Young, *Vanishing Trials–Vanishing Juries–Vanishing Constitution*, 40 Suffolk U. Law Rev. 67, 78 (2006); Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Cliches Eroding Our Day In Court And Jury Trial Commitments?*, 78 N.Y.U. Law Rev. 982, 1064; 1066;1071-1072;1133-1134(2003). As Professor Miller observes, Rule 56's "paper trials" of disputed fact issues

> would be an unfortunate break with the past. Our civil dispute resolution system has always preferred adjudication based on oral testimony in open court subject to cross examination....[T]hey are considered aspects of what often is referred to as a "day in court," with due process embracing notions of a fair trial before an impartial tribunal.

Id. at 1072 & n. 476, citing *Societe Internationale Pour Participations Industrielles et Commerciales S.A. v. Rogers*, 357 U.S. 197, 209(1958)("There are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his case."). See also Thomas, Suja A., *Why Summary Judgment Is Unconstitutional*, 93 Va. L. Rev. 139, 143-144;158-160;177-178(2007).

Such is the case here. The summary judgment procedure employed by the majority denied petitioners their right to a jury trial in the district court on the triable fact questions of whether respondents and their agents knew immediately upon entry of petitioners' home that this was not the "garage" listed in the warrant and whether the ensuing two searches and petitioners' detention were accomplished without lawful authority and in violation of their constitutional rights. Its repudiation of the core principles of *Beard*, *Reeves* and *Anderson* denied petitioners due process and a fair hearing on their claims.

CONCLUSION

For all the reasons stated herein, a writ of certiorari should issue to review and vacate the judgment of the court of appeals, reaffirm *Garrison's* holding which the Tenth Circuit has undermined, remand the matter to the district court for further discovery and a trial on the merits of petitioners' claims; or to provide them with such other relief as is fair and just in the circumstances.

Respectfully submitted,

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No. 08-4068
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MELISSA HARMAN and JUSTIN OVERTON,
Plaintiffs - Appellants,

v.

BRENT POLLOCK, Officer, Department of Public Safety, State Bureau of Investigations, City of Salt Lake, State of Utah; SCOTT BARNETT, Officer, Department of Public Safety, State Bureau of Investigations, City of Salt Lake, State of Utah,
Defendants - Appellees.

November 18, 2009, Filed

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH. (D.C. No. 2:03-CV-558-DAK).

COUNSEL: Robert B. Sykes and Alyson E. Carter, (with Scott R. Edgar on the brief), Robert B. Sykes & Associates, P.C., Salt Lake City, Utah, for Plaintiffs-Appellants.

J. Clifford Petersen, (with Mark L. Shurtleff, Utah Attorney General, on the briefs), Assistant Utah Attorney General, Salt Lake City, Utah, for Defendants-Appellees.

Before HENRY, Chief Judge, BRISCOE and LUCERO, Circuit Judges. LUCERO, J., dissenting.

OPINION

HENRY, Chief Judge.

In this ongoing action under 42 U.S.C. § 1983, a previous panel of this court determined that various material factual disputes remained regarding the constitutionality of the near two-hour early morning detention of Melissa Harman and Justin Overton (or the "Plaintiffs"), and the corresponding after-midnight searches of their garage apartment conducted by officers who worked for the Utah Department of Safety. After the panel's remand, the district court allowed further discovery, and, after reviewing the parties' motions for summary judgment, granted summary judgment to the defendant officers. With a satisfactorily comprehensive record before us, but with some pause and a few clarifications, we agree with the district court's conclusions that the defendants' discovery of marijuana ultimately gave them reason to detain the couple, to seize the marijuana, and to perform two more searches of the apartment. We thus affirm the district court's grant of summary judgment to the officer defendants, but we utilize some different reasoning.

I. BACKGROUND

We need not recount all of the facts that are set out in detail in *Harman v. Pollock*, 446 F.3d 1069, 1072-76 (10th Cir. 2006) ("*Harman I*"), except as they are relevant to this appeal.

A. *Harman I*

In February 2003, the Plaintiffs rented and resided in the garage apartment at 44 1/2; West 2700 South in South Salt Lake, Utah. Defendant Brent Pollock, a narcotics agent with the Utah Department of Public Safety's Bureau of Criminal Investigations, had suspected the residents of the adjacent 44 West 2700 South home of drug dealing and had been investigating and observing them over a period of seven months. Plaintiffs moved in approximately six weeks before the night in question. Agent Pollock was the case agent for the investigation and he performed a search of the garage apartment after the initial entry. Agent Pollock also directed another officer to conduct a "K-9" search of the apartment.

Defendant Scott Barnett (together with Agent Pollock, the "Officers") was a Sergeant with the Utah Department of Public Safety, to whom the investigating team answered. After the initial entry and the garage apartment was secured, Sergeant Barnett entered the apartment, and detained and questioned the Plaintiffs.

After some time surveilling the suspected drug activity of Ignacio Ascention (known as "Pawoo") and Conception Rodriguez (known as "Isabel"), who resided at 44 West 2700 South, Agent Pollock completed an affidavit in support of an application for a search warrant. The search warrant included "any and all outbuildings . . . of the property," and included a "detached garage," which was the Plaintiffs' residence:

> the premises known as: 44 West 2700 South, South Salt Lake City, Utah, a white house, brown roof, front door faces south, small wood fence to the west of the door across the front, # 44 on the wall to the right of the front door, a detached garage to the rear of the house on the east side.

Aplts' App. vol. I, at 210, 211. Utah's State Bureau of Investigations coordinated entry with its internal SWAT team unit known as a SERT (Special Emergency Response Team). On a cold February 13, 2003, after a 12:46 a.m. raid, the handcuffed Plaintiffs were placed in a van; the SERT officers quickly secured the scene; Sergeant Barnett interviewed the Plaintiffs; Agent Pollock searched the apartment and authorized a K-9 search; and finally, the Plaintiffs were cited for marijuana possession and released after 2:35 a.m.

In their § 1983 complaint, the Plaintiffs maintained that the post-midnight raid and the subsequent searches of their apartment and the accompanying detention violated their Fourth Amendment rights. In our prior decision in this case, we rejected the Plaintiffs' contention that the warrant did not sufficiently describe the area to be searched. Relying on *Maryland v. Garrison*, 480 U.S. 79, 87, 107 S. Ct. 1013, 94 L. Ed. 2d 72 (1987), we acknowledged that the search warrant's description of the property to be searched was overbroad, and constituted more than a clerical error. *Harman I*, 446 F.3d at 1078. But, despite some inconsistencies in the legal title research, and with some admonitions regarding the sanctity of the home, we concluded that the warrant described the premises with adequate particularity. *Id.*

Next, we rejected Plaintiffs' suggestion that Agent Pollock intentionally omitted and misstated material information in his affidavit in support of the search warrant. *Id.* We then concluded that the Officers were reasonably mistaken when they shattered windows and broke down the front door during the *initial* entry into Plaintiffs' garage apartment. *Id.* at 1081-82. Again citing *Garrison*, we reasoned that "'the objective facts available to the officers at the time suggested no distinction between [the targeted house and the garage apartment.]'" *See id.* at 1082 (quoting 480 U.S. at 88) (alterations supplied). Despite various factors that might suggest the existence of two separate residences, [1] "[g]iven the facial validity of the warrant, the officers permissibly entered the separate residence." *Id.*

When we considered the reasonableness of the subsequent search and detention of the Plaintiffs, however, we concluded that material facts remained in dispute as to (1) the reasonableness of the Officers' delay in realizing they were in a separate residence; (2) whether the subsequent search took place after this realization; and (3) the reasonableness of the Plaintiffs' lengthy detention. In connection with the detention, we acknowledged that while

> some portion of the detention may have been justified based on the presence of a small amount of marijuana, the district court did not reach this argument, and thus we ha[d] no factual findings or credibility determinations on this matter from the district court. In addition, the parties do not address the sizeable difference between seizing a person or property in an open area, and the seizing of property or persons "situated on

> private premises to which access is not otherwise available for the seizing officer."

Id. (quoting *Payton v. New York*, 445 U.S. 573, 587, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980)). We remanded for further factual findings, and we asked the district court to hold additional hearings as necessary as to the arguments regarding the Officers' authority to detain the plaintiffs and to the applicability of the plain view doctrine.

B. The district court's conclusions on remand

After remand, the district court allowed additional discovery. Both parties sought summary judgment. After concluding the searches and seizures were valid, the district court granted the Officers' motion for summary judgment.

First, the district court found that their "detention was a proper investigatory detention as established by *Terry v Ohio*," 392 U.S. 1, 20, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). Aplts' App. vol. III, at 830. The court, citing *Michigan v. Summers*, 452 U.S. 692, 705, 101 S. Ct. 2587, 69 L. Ed. 2d 340 (1981), recognized that *Terry* stops do not typically take place in the home, but noted they are not confined to momentary on the street detentions, and that they are not subject to rigid time restrictions. *Id.* at 830-31 (citing *Summers*, 452 U.S. at 704-05 ("If the evidence that a citizen's residence is harboring contraband is sufficient to persuade a judicial officer that an invasion of the citizen's privacy is justified, it is constitutionally reasonable to require that citizen to remain while officers of the law execute a valid warrant to search his home."); and *United States*

v. Sharpe, 470 U.S. 675, 685, 105 S. Ct. 1568, 84 L. Ed. 2d 605 (1985) (stating that "our cases impose no rigid time limitation on *Terry* stops")).

Second, the district court concluded that the discovery of the marijuana and pipe suggested that Plaintiffs were involved in criminal activity. The district court noted that the Officers suspected that the main house residents used the garage apartment to store and use drugs. The surveilling officers had seen lights on and heard voices in the building, and knew that the suspects had children. The district court determined that the Officers might have reasonably believed the garage apartment was being used to keep the drugs away from the children. The court also credited Sergeant Barnett's conclusion that Ms. Harman's New Mexico ties increased the likelihood of her association with the main house's Hispanic suspects. And, according to the district court, the Officers detained the Plaintiffs only as long as reasonably necessary.

Third, the district court concluded that the Officers' discovery of marijuana and the pipe standing alone provided reasonable suspicion to detain the Plaintiffs. The district court also found that Agent Pollock's search of the garage apartment was justified by probable cause and, in the alternative, exigent circumstances. The district court further found that Sergeant Barnett had no personal involvement in the searches, and that Agent Pollock had no personal involvement in the detentions. Finally, the court determined the Officers did not violate clearly established law, and that the Officers' behavior was objectively reasonable, and that the Officers were entitled to qualified immunity.

While we disagree with the district court that *Terry* provides the appropriate framework for analyzing the Plaintiffs' detention, and we give no credence to connections with the State of New Mexico, we do agree with the court's ultimate conclusion that the Officers' conduct was objectively reasonable. *See Lambertsen v. Utah Dep't of Corr.*, 79 F.3d 1024, 1029 (10th Cir. 1996) (stating that we are "free to affirm a district court decision on any grounds for which there is a record sufficient to permit conclusions of law, even grounds not relied upon by the district court" (internal quotation marks omitted)). The Officers' reasonable belief that the garage apartment served as a "crash pad," coupled with the Officers' plain view sighting of the marijuana and pipe, justified the detention and searches. The detention, the subsequent searches and the K-9 search were reasonable (although a separate search warrant would have been preferable) because the Officers had not confirmed the Plaintiffs were not connected to the illegal activity at the main house until all of Sergeant Barnett's interviews were complete, which was nearly two hours after the initial intrusion.

II. DISCUSSION

The Plaintiffs maintain that their two-hour plus detention, Agent Pollock's search, and the K-9 search were invalid, pointing to the immediate apparency that the garage apartment was a separate residence, and that they were clearly unrelated to the drug-ring suspects. They also challenge the propriety of a home-based investigatory detention under *Terry v. Ohio*, 392 U.S. 1, 20, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). Finally, they challenge the district court's findings that Agent Pollock, as case agent, and Sergeant Barnett, the

officer with full operational command of the scene, were alternatively not liable because they lacked personal knowledge of the detainment and searches.

Although the matter is close, after reviewing the additional discovery, we hold that the undisputed material facts support the district court's ruling that the searches and detention were reasonable. Although we reject the district court's determination that *Terry* provides the framework for our analysis, we conclude that the Officers acted reasonably under the rules of *Maryland v. Garrison* when they detained the Plaintiffs until confirming that they had no involvement with the main house drug ring. We therefore affirm the district court's grant of summary judgment in favor of the Officers.

A. Standard of Review

We review a grant of summary judgment on the basis of qualified immunity de novo. Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and one party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). "We construe the record in the light most favorable to the non-moving party." *Jiron v. City of Lakewood*, 392 F.3d 410, 414 (10th Cir. 2004) (citation omitted). There is a genuine issue of material fact "if the [nonmoving party] presents facts such that a reasonable jury could find in favor of the [nonmoving party]." *Simms v. Okla. ex rel. Dep't of Mental Health & Substance Abuse Servs.*, 165 F.3d 1321, 1326 (10th Cir. 1999) (citation omitted). "If there is no genuine issue of material fact in dispute, we

determine whether the district court correctly applied the substantive law." *Id.*

In a case such as this one, when a defendant invokes qualified immunity, the plaintiffs "must show that (1) the official violated a constitutional or statutory right; and (2) the constitutional or statutory right was clearly established when the alleged violation occurred." *Mimics, Inc. v. Village of Angel Fire*, 394 F.3d 836, 841 (10th Cir. 2005) (internal quotation marks omitted). In *Pearson v. Callahan*, 129 S. Ct. 808, 815-16, 172 L. Ed. 2d 565 (2009), the Supreme Court held that federal courts have discretion to determine "which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Id.* at 818.

"Requiring the law to be clearly established provides defendants with 'fair warning' that their conduct is unconstitutional." *Mimics*, 394 F.3d at 842 (quoting *Hope v. Pelzer*, 536 U.S. 730, 739-40, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002)). "'The law is clearly established when a Supreme Court or Tenth Circuit decision is on point, or if the clearly established weight of authority from other courts shows that the right must be as plaintiff maintains.'" *Id.* (quoting *Roska v. Peterson*, 328 F.3d 1230, 1248 (10th Cir. 2003)). To be clearly established,

> [t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but

> it is to say that in the light of pre-existing law the unlawfulness must be apparent.

Anderson v. Creighton, 483 U.S. 635, 640, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987) (citation omitted). Thus, qualified immunity leaves "'ample room for mistaken judgments,'" *id.* at 655 n.8 (quoting *Malley v. Briggs*, 475 U.S. 335, 341, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986)), and protects "all but the plainly incompetent or those who knowingly violate the law." *Id.* at 658 (quoting *Malley*, 475 U.S. at 341).

B. The Officers' justifiable belief that the Plaintiffs' apartment was connected to illegal drug use was sufficient to render the searches and detention reasonable under the Fourth Amendment.

We begin with the Plaintiffs' pivotal challenge: they contend that the Officers were put on notice, upon or just after the initial entry into the apartment, that the garage apartment was a separate and distinct residence from the main house under investigation. At that time, Plaintiffs argue, the Officers should have "le[ft] immediately," Aplts' Br. at 25, under the Supreme Court's ruling in *Maryland v. Garrison*, 480 U.S. at 87. Because they continued the detention and the searches, the Plaintiffs contend, the Officers violated the Fourth Amendment.

In response, the Officers argue that, even after entering, they reasonably believed that the Plaintiffs' garage apartment was a "crash pad" that was used to store and use drugs connected to the main residence. Importantly, in the Officers' view, the reasonableness of the detention and search is *not* undermined by the

evidence that the garage apartment was a separate residence: despite that evidence, apparent on their initial entry, they maintain that they still *reasonably* believed that the Plaintiffs were connected to the illegal activity at the main residence. The Officers further contend that the discovery of the marijuana in the Plaintiffs' apartment provided additional justification for the detention and searches. Finally, the Officers argue that the detention and searches were justified by exigent circumstances.

We are persuaded, in part, by the Officers' arguments. We hold that the totality of the evidence supporting the "crash pad" theory, combined with the discovery of the marijuana upon entry, establishes that the search and detention were reasonable under the Fourth Amendment. However, we reject the Officers' argument that the detention and searches were justified by exigent circumstances.

1. *Maryland v. Garrison* is the controlling authority to determine the reasonableness of the detention and the subsequent searches.

The Plaintiffs are correct that *Maryland v. Garrison*, 480 U.S. 79, 87, 107 S. Ct. 1013, 94 L. Ed. 2d 72 (1987), is the controlling authority. Under *Garrison*, once the Officers "were put on notice of the risk" that they entered a home that was unconnected to the illegal activity described in the warrant, they had an immediate duty to retreat. *See id.*

Garrison's holding is directed at searches, but in light of related precedent, its analysis applies to detentions as well. In particular, the Supreme Court has held that

officers executing a search warrant for contraband have the authority "to detain the occupants of the premises while a *proper* search is conducted." *Summers*, 452 U.S. at 705 (emphasis supplied); *see also Muehler v. Mena*, 544 U.S. 93, 98, 125 S. Ct. 1465, 161 L. Ed. 2d 299 (2005) (observing that "[a]n officer's authority to detain incident to a search is categorical; it does not depend on the 'quantum of proof justifying detention or the extent of the intrusion to be imposed by the seizure.'") (quoting *Summers*, 452 U.S. at 705); *Pray v. City of Sandusky*, 49 F.3d 1154, 1159 (6th Cir. 1995) (applying *Garrison* to determine "what searches and seizures . . . took place after the mistake [the officers were in the wrong residence] was known"). Thus, under *Summers*, an officer's authority to detain the occupant of a residence while searching for contraband pursuant to a warrant lasts only as long as the search is proper. 452 U.S. at 705. [2]

2. The Officers' "crash pad" theory finds support in the record.

On remand, the Officers put forth a "crash pad" theory, explaining that they suspected the main home's occupants used the garage apartment as a place to store and use drugs. The district court found this explanation credible and further concluded that "[t]he indicia of a dwelling [observed by the Officers after they entered the Plaintiffs' apartment] did not so thoroughly dispel this idea [of a crash pad] as to dispel probable cause." Aplts' App. vol. III, at 840.

In support of the crash pad theory, the district court noted that Agent Pollock knew the main home's suspects had young children, and believed that the

suspected dealers wanted to keep the drug storage and usage away from the children. (There was also testimony, however, that perhaps weighed against this theory - Isabel "would bring her children along when she was selling cocaine." *Id.* vol. II, at 382; *see id.* at 386.) After remand, further discovery indicated that Agent Pollock thought Ms. Harman was actually "living in the main house and had just gone out to the garage temporarily" or perhaps she had gone "out to the garage partying." *Id.* at 372. And, although Agent Pollock did not suspect her to be a "known character[] in the investigation" (presumably based on the seven months of surveillance of the main house, where he observed only Hispanic-appearing suspects), *Harman I*, 446 F.3d at 1073, 1085, after discovering that Ms. Harman was involved, he believed she was "just somehow intertwined in this." Aplts' App. vol. III, at 682.[3]

Although the Officers did not previously assert the crash pad theory per se, they did put forth a similar theory below. "It was the experience of the Defendants that people sleep all over the place in drug homes, so a person sleeping in the garage did not necessarily mean to the Defendants that the garage was a separate residence from the house." Officers' Br. filed 4/13/2005. (We must note that the Officers' related assertion in this appeal that they believed Isabel and Pawoo might utilize a crash pad for the well-being of their children is less tenable, given that Officer Pollock's reconnaissance team reported *no* sightings of these two entering the garage over a course of seven months, and given Officer Pollock's earlier characterization of the garage as a "little workshop." *See Harman I*, 446 F.3d at 1085; Aplts' App. vol. III, at 683.)

Nevertheless, Sergeant Barnett noted that "drug dealers often use garages or back places" and "[t]hey sleep wherever." Aplts' App. vol. II, at 417. Sergeant Barnett noted that he has "found people that have had a bed in the garage next to their drug dealing area or next to the meth lab . . . ." *Id.* Other SERT officers confirmed that in the execution of similar warrants, the discovery of outbuildings with electricity and a sink was not uncommon. *Id.* at 432; *see id.* at 454 ("A lot of times we go into these separate garages and things like that that have those facilities that are cooking meth."); *id.* at 425 ("[A] lot of narcotics people selling or distributing narcotics don't like to do it out of their home itself.").

Sergeant Barnett also stated that it was not until he "interviewed Mr. Overton, Ms. Harman, and the occupants of the [main] house" that he realized that the rear building and its occupants were not part of the drug dealing operation at the main house. *Id.* at 414. According to Sergeant Barnett, under department procedures, the officers would take everyone into custody, and question them to determine whether or not the officer was in the correct location. *Id.* at 260; *but see id.* at 237 (Testim. of Sergeant Pollock: "They were restrained. They *weren't* taken into police custody." (emphasis supplied)).

We agree with the district court's analysis of this evidence. We must "defer to trained law enforcement personnel, allowing officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that might well elude an untrained person." *United States v. Guerrero*, 472 F.3d 784, 787

(10th Cir. 2007) (alteration and internal quotation marks omitted); *see also United States v. Winder*, 557 F.3d 1129, 1133 (10th Cir. 2009). Here, the Officers invoked their experience in investigating drug trafficking offenses to support their theory that the garage apartment might have been used by the suspects in the main residence. Relying upon the Officers' expertise, to the extent that the garage apartment reasonably appeared to be an extension of the main residence, they acted reasonably. Under the unique facts of this case, it was not until after the completion of Sergeant Barnett's interviews that they "discovered that there were two separate units. . . and therefore were put on notice of the risk that they might be in a unit erroneously included within the terms of the warrant." *Garrison*, 480 U.S. at 87. Thus, under the circumstances of this case, the Officers' failure to realize the overbreadth of the warrant until after the conclusion of the interviews was objectively understandable and reasonable.[4]

But the SERT officers also saw marijuana in plain view, were familiar with crash pad type living situations, and soon learned that Melissa Harman was a resident whose name also appeared on the Questar gas bill for the main house, all of which suggested the quarters may have been part of the main house or its operations as well. Given these considerations and the latitude we afford officers and their expertise, it falls squarely within the *Garrison* directive to allow the officers a reasonable amount of time to confirm that the apartment-cum-reconfigured-detached-garage was "erroneously included within the terms of the warrant." *Garrison*, 480 U.S. at 87.

3. The Officers' discovery of the marijuana in the Plaintiffs' apartment provides additional support for the detentions and searches.

As we noted in *Harman I*, "[t]he plain view doctrine authorizes seizure of illegal or evidentiary items visible to a police officer whose access to the object has some prior Fourth Amendment justification and who has probable cause to suspect that the item is connected with criminal activity." 446 F.3d at 1087 (quoting *Illinois v. Andreas*, 463 U.S. 765, 771, 103 S. Ct. 3319, 77 L. Ed. 2d 1003 (1983)). "Of course, if the police officers' presence in the home itself entailed a violation of the Fourth Amendment, no amount of probable cause to believe that an item in plain view constitutes incriminating evidence will justify its seizure." *Id.* (quoting *Soldal v. Cook County, Ill.*, 506 U.S. 56, 66 n.10, 113 S. Ct. 538, 121 L. Ed. 2d 450 (1992)).

To prevent the plain view doctrine from eviscerating Fourth Amendment protections, we have imposed a three-prong test that the government must satisfy to justify its application. In particular, the government must establish that: "(1) the officer was lawfully in a position from which to view the object seized in plain view; (2) the object's incriminating character was immediately apparent-i.e.[,] the officer had probable cause to believe the object was contraband or evidence of a crime; and (3) the officer had a lawful right of access to the object itself." *United States v. Soussi*, 29 F.3d 565, 570 (10th Cir. 1994).

Here, there is no dispute as to the second requirement-the incriminating character of the marijuana was "immediately apparent." *Id.* The first and third

requirements turn on a question of timing, i.e., whether, when they observed the marijuana, the Officers were validly executing the warrant. The answer to that question turns on the *Garrison* analysis, i.e., whether, at some point *before* they observed the marijuana, the Officers knew or reasonably should have known that they had entered a home that was unconnected to the illegal activity described in the warrant, therefore triggering an immediate duty to retreat. *Garrison*, 480 U.S. at 87. If so, the plain view doctrine is inapplicable.

On that issue, there was some testimony that the SERT officers had secured the garage apartment before the pipe and marijuana were discovered. Aplts' App. vol. II, at 540 (SERT Officer Todd Leiendecker: "[O]nce the lights were turned on I did a quick scan of the area . . . the lights were turned on because the building was secured."). Similarly, SERT Officer Kirk Christensen recalled seeing marijuana and the pipe on the counter "[w]hen [he] came back in[to the apartment]." *Id.* at 449. SERT Officer Daniel Fuhr testified that there was "marijuana out in the open." *Id.* at 452. Evidently, the SERT officers secured the residence, and the only persons remaining in, or allowed to enter, the garage apartment were State Bureau of Investigations officers, including Sergeant Barnett and Agent Pollock.

We conclude that when the SERT officers saw the marijuana in the Plaintiffs' apartment, and when Sergeant Barnett and Agent Pollock entered the apartment, they still reasonably believed that the Plaintiffs were connected to the illegal activity at the main residence. That suspicion remained until Sergeant Barnett had interviewed the occupants from the main

house and from the garage apartment. Accordingly, the plain view doctrine allows the marijuana to be considered as part of the totality of evidence supporting the challenged detentions and searches.[5]

4. The detentions and searches were not justified by exigent circumstances.

The Officers also argue (and the district court also found) that the searches were supported by exigent circumstances. The Officers maintain that because they were already aware of the Plaintiffs' "drug involvement," having seen the marijuana, that releasing Ms. Harman and Mr. Overton would risk destruction of any further evidence of criminal activity. Aple's Br. at 42-43; *see United States v. Thomas*, 372 F.3d 1173, 1177 (10th Cir. 2004) (citing *Minnesota v. Olson*, 495 U.S. 91, 100, 110 S. Ct. 1684, 109 L. Ed. 2d 85 (1990)).

Upon the discovery of the marijuana, the Officers had at least reasonable suspicion to detain the Plaintiffs before contemplating a full-scale search of the garage apartment. In evaluating exigency, we consider whether the circumstances are "'subject to police manipulation or abuse,'" or "'motivated by an intent to arrest and seize evidence.'" *United States v. Zogmaister*, 90 F. App'x 325, 330-31 (10th Cir. 2004) (unpublished) (quoting *United States v. Aquino*, 836 F.2d 1268, 1272 (10th Cir. 1988); and *United States v. Smith*, 797 F.2d 836, 840 (10th Cir. 1986)).

While the sanctity of the home protects the occupants' privacy interests in the activities that take place within, the Officers could have easily secured the residence while waiting for a proper warrant. *Cf. Segura v.*

United States, 468 U.S. 796, 812, 104 S. Ct. 3380, 82 L. Ed. 2d 599 (1984) (upholding the securing of premises from within, and stating that "officers who have probable cause and *who are in the process of obtaining a warrant* have no reason to enter the premises before the warrant issues, absent exigent circumstances which, of course, would justify the entry") (emphasis supplied). "[T]he heightened protection we accord privacy interests is simply not implicated where a seizure of premises, not a search, is at issue." *Id.* The "securing [of] a dwelling, on the basis of probable cause, to prevent the destruction or removal of evidence while a search warrant is being sought is not itself an unreasonable seizure of either the dwelling or its contents." *Id.* at 810. We prefer "the informed and deliberate determinations of magistrates empowered to issue warrants as to what searches and seizures are permissible under the Constitution . . . over the hurried action of officers." *United States v. Lefkowitz*, 285 U.S. 452, 464, 52 S. Ct. 420, 76 L. Ed. 877 (1932).

As Sergeant Barnett testified, had there been *no* separate drug investigation at the main house, and the Officers saw the pipe and marijuana in plain view, before conducting a search, they "would either get a consent to search the residence or get a search warrant for the residence." Aplts' App. vol. I, at 230.

We appreciate Sergeant Barnett's candor regarding the need for consent or a separate warrant. As noted in *Harman I*, however, the Officers here "at no time considered obtaining a separate warrant." 446 F.3d at 1088. As the Officers well know, telephonic warrants (obtained pursuant to Fed. R. Crim. P. 41(c)) provide a mechanism by which officers can obtain quick judicial

review of search warrant applications, and it seems obvious that such procedures may have obviated much of this litigation. And in their brief, the Officers maintain that "[w]ere a magistrate to reevaluate the warrant with the information [Agent] Pollock had at the time he performed his search, the magistrate would approve the warrant to search the garage." Aples' Br. at 41. This assertion only strengthens the conclusion that the Officers would have had no trouble obtaining an independent telephonic warrant well within the near two-hour timeframe involved here. We thus reject the argument that the Officers acted based on the exigency of the imminent destruction of evidence.

5. The combined weight of the "crash pad" evidence and the marijuana discovered in the Plaintiffs' apartment satisfies the *Garrison* standard.

Standing alone, the Officers' "crash pad" evidence and the marijuana in plain view may not have been sufficient to justify the full extent of the detention and searches under the Fourth Amendment. However, taken together, that evidence establishes that the Officers reasonably believed that the Plaintiffs were connected to the illegal activity at the main residence until they completed all of the questioning.

In reaching this conclusion, we acknowledge "'the need to allow some latitude for honest mistakes that are made by officers in the dangerous and difficult process of making arrests and executing search warrants.'" *Harman I*, 446 F.3d at 1083 (quoting *Garrison*, 480 U.S. at 87). As such, although the investigation was less than model work, we cannot say the Officers' actions were "plainly incompetent" or "knowing[] violations [of] the

law." *Malley*, 475 U.S. at 341. Because we hold that the Officers' detention and searches were reasonable, we need not address the Plaintiffs' third argument regarding the personal involvement of the Officers.[6]

III. CONCLUSION

We conclude that the Officers acted reasonably when they detained the Plaintiffs, suspecting they might somehow be related to the main house's drug ring. Although the view of the marijuana was fairly plain, the circumstances were not apparently exigent. While a second warrant would be the preferable route, we hold that Agent Pollock's subsequent search and his authorization of the K-9 search were reasonable, given the uncertainties regarding Ms. Harman's possible involvement and given the presence of the contraband. As stated earlier, our holding is limited to the narrow confines of this case, involving a facially valid warrant, with a legal description that included the detached garage; the plain view of marijuana and a pipe; the necessity to interview the main house residents to confirm the members of the drug ring; the presence of Ms. Harman's name on the gas bill for the main house; and the Officers' reasonable application of their expertise in sorting out the identities of and the relationships between the main house and garage apartment residents. As such, we AFFIRM the district court's grant of summary judgment to the Officers.

Footnotes

1 These factors included (1) the simultaneous raids of "residence # 1" and "residence # 2," (2) the three separate mailboxes (two on 44 West 2700 South and one

on 44 1/2; West 2700 South), (3) the deed of trust, which indicated the property encompassed two separate lots, (4) the U.S. Postal Service records, which listed 44 1/2; 2700 South as a separate address, (5) the gas bill for 44 West 2700 South in Ms. Harman's name, (6) the scout team's inspection of the front door hinges, and presumably, the residential type front door and the porch, porch light, rug etc., on 44 1/2; West 2700 South, (7) the residential windows on 44 1/2; West 2700 South, (8) the New Mexico license plates on Ms. Harman's car, (9) the cement walkway and landscaping, and (10) separate telephone service. 446 F.3d at 1080.

2 As we have noted, the district court concluded in part that the entirety of the Plaintiffs' detention was proper under *Terry*, 392 U.S. at 20. We disagree. The Ninth Circuit has repeatedly and ably explained why *Terry* generally does not apply within one's home. *See United States v. Washington*, 387 F.3d 1060, 1067 (9th Cir. 2004) ("*Terry*'s twin rationales for a brief investigatory detention-the evasive nature of the activities police observe on the street and the limited nature of the *intrusion-appear to be inapplicable to an encounter at a suspect's home.*") (internal citations omitted) (emphasis added); *United States v. Martinez*, 406 F.3d 1160, 1165 (9th Cir. 2005) ("Certainly, the usual rules pertaining to *Terry-stops* do not apply in homes.").

Here, it is *Garrison* and *Summers*, not *Terry*, that provide the proper framework for analyzing the Plaintiffs' detention. In particular, the validity of the detention of the Plaintiffs stands or falls on the validity of the ongoing search.

3 Although Ms. Harman's name was mistakenly on the utility gas bill for the *main* house on January 16, 2003 (long after the surveillance began), the surveilling officers had never seen anyone resembling Ms. Harman, except perhaps that her "features may have been consistent with purchasers of drugs" from the *main* house. *Harman I*, 446 F.3d at 1076.

4 Although the dissent recognizes the "measured balance" the Supreme Court struck in *Garrison*, it then suggests we have "upset[] that balance." Dissent at 7. But we must apply the measured directive as instructed by *Garrison*:

> The *Garrison* Court's ultimate directive remains salient: "The officers' conduct and the limits of the search [are] based on the *information* available as the search proceed[s]." *Id.* This principle, along with a recognition of "the need to allow some latitude for honest mistakes that are made by officers in the dangerous and difficult process of making arrests and executing search warrants," *Garrison*, 480 U.S. at 87 (footnote omitted), is what must guide us in determining if and when the execution went awry.

United States v. Ritter, 416 F.3d 256, 266 (3d Cir. 2005)(alternations supplied). This is the exact approach we have adopted. Clearly the SERT officers recognized the garage to be an apartment soon after their justified entry. But *Garrison* teaches that is not the end of the matter. The warrant's language encompasses a "detached garage" and "any and all outbuildings . . . of the property." Aplts' App. vol. I, at 210, 211. The dissent seems to suggest that the conversion of this

garage to a residence means that it is no longer a "detached garage" or part of the "outbuildings."

5 The dissent states that defendants "point to no facts that would provide probable cause to search Harman and Overton's home." Dissent at 8. We disagree that the officers were not lawfully in a position from which to view the marijuana. *Harman I* resolved the legality of the SERT officers' initial entry into the garage apartment. 446 F.3d at 1082. The SERT officers discovered the marijuana and pipe during or just after their securing of the apartment, which took but a few minutes. Rather than suggest the SERT officers should have retreated immediately when discovering the garage to be a dwelling without regard to the reasonable inferences made from the unique facts of this case, the touchstone is "sufficient probability." *Garrison*, 480 U.S. at 87 (internal quotation marks omitted). Given this unique set of circumstances, the Officers were "acting on facts leading sensibly to their conclusions of probability" of a connection with the main house. *Id.* at 87 n.11 (internal quotation marks omitted).

6 We also reject the Officers' argument that Ms. Harman's "ties to New Mexico" (via her license plate) suggested her involvement with the main house's residents. Aples' Br. at 30. According to this theory, Ms. Harman's New Mexico license plate (bearing the motto "Land of Enchantment"), which has a "high Hispanic population and is a border state through which drugs from Mexico might pass," supported the district court's reasonableness conclusion. *Id.*

Finally, in evaluating these matters, officers and policy makers might take note that with the proliferation of

the use of SWAT teams comes the concomitant increase of mistakes a SWAT team may make, and the increased risk of accidental death, injury and the terrorizing of innocents, including children. According to a Cato Institute study cataloguing various flawed paramilitary raids, "at least 780 cases" "reached the appellate level between 1989 and 2001," which marks a significant increase from the previous decade. Radley Balko, *Overkill: The Rise of Paramilitary Police Raids* 43 (Cato Inst. 2006), available at http://www.cato.org/pub_display.php?pub_id=6476. Not only do these raids test the Fourth Amendment rights of the often law-abiding inhabitants and their families, but also they are conducted with substantial firepower. *See id.* (cataloguing botched drug raids at the incorrect address and noting that "death, injury, and terrorizing of innocents . . . aren't merely a regrettable, infrequent consequence of an otherwise effective police tactic" but instead are "the inevitable consequence of a flawed, overbearing, and unnecessary form of drug policing"); *see also Holland v. Harrington*, 268 F.3d 1179, 1197-99 (10th Cir. 2001) (expressing concern about the poor planning used by a sheriff's department to execute a "dynamic entry" raid involving only a misdemeanant and endangering the residence's several children) (Henry, J., concurring).

DISSENT

LUCERO, J., dissenting

Because my respected colleagues fail to apply appropriate summary judgment standards and create a circuit split by failing to adhere to Maryland v Garrison, 480 U.S. 79, 107 S. Ct. 1013, 94 L. Ed. 2d 72 (1987), the

established Supreme Court jurisprudence that should govern this case, I must dissent.

I

Shortly after midnight on February 12, 2003, seven members of Utah's Special Emergency Response Team ("SERT") battered down the door of an apartment occupied by Melissa Harman and Justin Overton at 44 1/2 West 2700 South, South Salt Lake City. The couple was asleep in bed--Overton unclothed and Harman in her underwear--when SERT members entered their bedroom with guns drawn. Both residents awoke in shock and fear and were immediately directed into the living room, where they were handed a single bed sheet to cover themselves and then were handcuffed to a couch. Harman was so frightened that she lost control of a basic bodily function. Officers learned that the individuals they had detained were named Melissa Harman and Justin Overton. Harman and Overton were re-handcuffed, moved to a police van and then to a second vehicle, where defendant Scott Barnett questioned them. Meanwhile, defendant Brent Pollock directed another search of Harman and Overton's apartment.

What the SERT team knew even before entering the Harman-Overton residence is that they were executing a warrant directed to "44 West 2700 South, South Salt Lake City," the suspected home of two drug dealers named Isabelle and Pawoo. Although the warrant also described a "detached garage," it did so erroneously. There was no "garage"; in fact, the only detached building was the separate apartment, with a separate address, occupied by Harman and Overton.

II

"When applying [a summary judgment] standard, we view the evidence and draw reasonable inferences therefrom in the light most favorable to the nonmoving party." Simms v. Okla. ex rel. Dep't of Mental Health & Substance Abuse Servs., 165 F.3d 1321, 1326 (10th Cir. 1999). With all due respect to my colleagues, they have failed to apply this standard in their recitation of the facts. When viewed in the light most favorable to Harman and Overton, there can be no doubt that the officers knew immediately upon entry that the building described in the warrant as a "detached garage" was a separate residence and that in fact, there was no garage at all.

The officers proceeded in three waves, each supervised by the defendants [1]: Pollock was the case agent and Barnett his sergeant, and they had "control the entire time." First came the SERT team. Immediately upon entry, the SERT team knew they were not in a garage. They knew that they were in an apartment. These seven officers were followed within approximately five minutes by a team of investigating officers led by Barnett. These officers also immediately observed that the garage was, in fact, an apartment. The defendant supervisors ordered a third wave, the K-9 unit. The plaintiffs were kept in detention for an additional hour and a half until the K-9 search was completed and the police issued Harman and Overton a citation for possession of marijuana.

Investigating officers and SERT members executing the warrant overwhelmingly testified that the Harman-

Overton dwelling was clearly an apartment. One officer provided the following deposition testimony:

> Q. Was it obvious to you that it was an apartment, a kitchen and things like that?
> A. Uh-huh (affirmative), yeah.
> Q. Was there any question in your mind that you were looking at a residence when you walked in there?
> A. No. Once I was in there, no.

A second member of the search team similarly testified:

> Q. Did it look like a garage to you?
> A. No, it was kind of--kind of a seedy apartment, kind of run down.
> Q. Run-down, seedy apartment?
> A. Uh-huh (affirmative).
> Q. Okay. And it was obvious to you right away when you walked in, right?
> A. From the inside, yes.

The same officer confirmed that he knew the apartment was "[s]omebody's living quarters" within "a few seconds of when [he] walked in."

Testimony of other law enforcement officials on the scene corroborates the fact that Harman and Overton's home was "obvious[ly]" an apartment. One SERT member stated it "was obvious it was an apartment. It was obvious people were living in there as some kind of an apartment." Daniel Fuhr, the team leader for the search, testified, "Someone was living there. It was obvious." Fuhr also testified that he "w[as] concerned

that it might be a residence" before the search even began, and that he warned Pollock of his concern.

Several officers testified that they were surprised to find an apartment rather than a garage. One stated he "was surprised that there was a living quarter back over there because our information that we got, it was a garage." Another officer, when asked whether "it looked like it could be some sort of an apartment," responded, "Once I got in, yeah. It actually surprised me that it was."

Ignoring the obvious, the defendants tell a different tale. Pollock averred that he saw "no indication that [the apartment] was a secondary residence." Instead, he testified that he believed "maybe they were just out in the garage partying." A jury might be free to credit this testimony; we are not. In reviewing a grant of summary judgment in favor of defendants, we must apply summary judgment jurisprudence and assume that it was "obvious" that Harman and Overton's home was an apartment and that this fact was clear to law enforcement as soon as they broke down the door.

III

Although the majority fails to recite the pertinent facts in the light most favorable to the plaintiffs, its more serious mistake is in misreading Maryland v. Garrison.[2] In Garrison, the Supreme Court spoke clearly and unambiguously: Police are "required to discontinue the search . . . as soon as they discover[] that there [a]re two separate units . . . and therefore [a]re put on notice of the risk that they might be in a unit erroneously

included within the terms of the warrant." 480 U.S. at 87.

Instead of applying Garrison, the majority opinion stands it on its head. What Garrison requires is for officers to "discontinue the search" once they were "put on notice of the risk that they might be in a unit erroneously included within the terms of the warrant," id.; the majority instead rules that henceforth officers may detain individuals and continue the search of a home erroneously included in a warrant until the detainees can prove to the officers that they are "unconnected to the illegal activity described in the warrant," (Majority Op. 12-13 (quoting Garrison, 480 U.S. at 87).) In other words, my colleagues require plaintiffs to satisfy police that their separate apartment was not serving as a "crash pad" for their drug dealing neighbors before a search and detention need be ceased. That is simply not the standard under clearly established Fourth Amendment law. And this is not a state of affairs that should be allowed to exist under our Constitution.

A

In Garrison, police had a valid warrant to search the "third floor apartment" of a building. 480 U.S. at 80. In executing the warrant, police learned that the third floor actually contained two separate apartments, only one of which belonged to the person being investigated. Id. While searching the apartment erroneously named in the warrant—under the reasonably mistaken belief that they were searching the suspect's apartment—police discovered and seized contraband. Id. Police immediately discontinued their search after realizing

they were not in the suspect's apartment. Id. at 81. The Supreme Court held that the contraband was not obtained in violation of the Fourth Amendment because it was discovered before police would have reasonably realized their mistake. Id. at 86. Had the timing been reversed, so too would have been the outcome:

> [A]s the officers recognized, they were required to discontinue the search of [defendant's] apartment as soon as they discovered that there were two separate units on the third floor and therefore were put on notice of the risk that they might be in a unit erroneously included within the terms of the warrant. The officers' conduct and the limits of the search were based on the information available as the search proceeded.

Id. at 86-87.

Once put on notice that they are searching a second apartment under a warrant authorizing the search of only a single home, police may continue searching the second apartment only if: (1) they procure an additional warrant or (2) both probable cause and exigent circumstances exist. See id.; United States v. Karo, 468 U.S. 705, 714-15, 104 S. Ct. 3296, 82 L. Ed. 2d 530 (1984) ("Searches and seizures inside a home without a warrant are presumptively unreasonable absent exigent circumstances."). As one circuit court has explained, upon realizing there is a second apartment, police are "obligated to either limit the search to those areas clearly covered by the warrant or to discontinue entirely their search." United States v. Ritter, 416 F.3d 256, 266 (3d Cir. 2005). Police may not, as the majority suggests, continue searching the second apartment

until they rule out the possibility that its residents are in some way connected to the illegal activity being conducted in a nearby home. The majority-created law enforcement right to confirm that an apartment is unconnected to illegal activity occurring elsewhere before discontinuing a search, (Majority Op. 17-18 n.4), is antithetical to law enforcement's duty to immediately discontinue searching when put on notice of a risk that an apartment was erroneously included in the warrant, Garrison, 480 U.S. at 87.

Garrison strikes a measured balance between the sanctity of the home and "the need to allow some latitude for honest mistakes that are made by officers in the dangerous and difficult process of making arrests and executing search warrants." [3] 480 U.S. at 87. The majority upsets that balance by rejecting the Garrison test of a "unit erroneously included within the terms of the warrant," id., instead substituting a dramatically looser "unconnected to the illegal activity described in the warrant" standard. (Majority Op. 12-13.)

B

It is not only the plain text of Garrison that contradicts the majority's analysis; a review of Garrison's underlying principles leaves no doubt that the grant of summary judgment in the case before us was erroneous. Garrison is merely a particular application of the general rule that police cannot rely on a warrant after learning facts that vitiate probable cause. "[O]nce the mistake is discovered, the government cannot use the authority of the warrant, or of the order, to conduct a search or interception that they know is unsupported by probable cause or is otherwise outside the scope of

the statute or the Constitution." United States v. Ramirez, 112 F.3d 849, 851-52 (7th Cir. 1997) (citing Garrison, 480 U.S. at 87); see also United States v. Bowling, 900 F.2d 926, 932 (6th Cir. 1990). Consequently, the appropriate Fourth Amendment analysis is not whether two apartments are somehow connected, as the majority contends, but whether police knew or reasonably should have known that they lacked probable cause to search the second apartment based on knowledge gained during the execution of the warrant. The defendants here point to no facts that would provide probable cause to search Harman and Overton's home. Consequently, the search was unconstitutional.

Moreover, defendants clearly lacked probable cause to search Harman and Overton's home once they discovered it was an apartment. It has long been the rule that "[p]robable cause must be shown for searching each house or, in this case, each apartment." United States v. Hinton, 219 F.2d 324, 325-26 (7th Cir. 1955); see also United States v. Perez, 484 F.3d 735, 741 (5th Cir. 2007); Shamaeizadeh v. Cunigan, 338 F.3d 535, 552-53 (6th Cir. 2003); Mena v. City of Simi Valley, 226 F.3d 1031, 1038 (9th Cir. 2000); United States v. Rios, 611 F.2d 1335, 1347 (10th Cir. 1979), disapproved on other grounds in United States v. Young, 470 U.S. 1, 14 n.11, 105 S. Ct. 1038, 84 L. Ed. 2d 1 (1985). An apartment is entitled to the heightened Fourth Amendment protections afforded to any home. Once law enforcement discover that a unit is an apartment, they are no longer free to treat it as an outbuilding or garage, no matter the wording of the warrant. To reiterate, on summary judgment, we must credit

testimony from law enforcement that the building did not look like a garage, but appeared to be an apartment.

To determine whether probable cause existed to search the plaintiffs' residence, one need simply consider whether the magistrate would have issued a warrant to search the apartment if provided the information that police immediately discovered upon entering Harman and Overton's home. Obviously, the magistrate would not have done so. If the affidavit had accurately described Harman and Overton's home as an "apartment" rather than a "detached garage," then the magistrate would have required distinct probable cause to search the apartment. But nothing in the affidavit suggests that evidence of illegal activity would be found in the apartment. [4] The belief that the building was a garage was in error, and proximity is insufficient to create probable cause. See Ybarra v. Illinois, 444 U.S. 85, 91, 100 S. Ct. 338, 62 L. Ed. 2d 238 (1979) ("[M]ere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause . . . .").

The majority dodges the foregoing analysis. Rather than considering whether police knew they lacked probable cause to search the subject apartment, the majority holds that Pollock's inchoate suspicion that Harman was "just somehow intertwined with this" justified what amounts to the warrantless search of a home. No officer could reasonably believe that such a hunch provides probable cause. See United States v. Concepcion Ledesma, 447 F.3d 1307, 1316 (10th Cir. 2006) (probable cause requires "a particularized and objective basis for suspecting legal wrongdoing" (quotation omitted)). [5]

A reasonable jury could determine defendants directed the detention of Harman and Overton and two searches of their home long after being put on notice that they lacked any legal basis to do so. Therefore I would hold that plaintiffs met their summary judgment burden of showing a Fourth Amendment violation.

IV

Because the majority opinion holds Harman and Overton failed to create a genuine dispute as to whether defendants violated the Fourth Amendment, it does not address whether plaintiffs' claims are grounded in clearly established law. I would hold that they are. Prior to the majority's decision in this case, the law was well settled that police are "required to discontinue the search" immediately upon being "put on notice of the risk that they might be in a unit erroneously included within the terms of the warrant." Garrison, 480 U.S. at 87. When defendants executed the warrant in this case, Garrison had been the law for more than fifteen years. This Supreme Court precedent should have made the contours of the Fourth Amendment "sufficiently clear" to the defendants. Anderson v. Creighton, 483 U.S. 635, 640, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987). Indeed, in an earlier appeal of this case, the parties did not dispute that "the law in this area was well-established at the time of the search in question." Harman v. Pollock, 446 F.3d 1069, 1077 (10th Cir. 2006) (quotation omitted).

V

Viewing the evidence presented in the light most favorable to the non-moving parties, the plaintiffs have

demonstrated: (1) that a reasonable jury could determine that defendants violated the Fourth Amendment; and (2) that the rights at issue were clearly established at the time of defendants' unlawful conduct. Consequently, I would reverse the grant of summary judgment.

Footnotes

1 Pollock and Barnett's supervision included maintaining constant radio contact with all law enforcement on the scene. In addition to enabling direct communication, the radios allowed Pollock and Barnett to "overhear . . . conversations going back and forth" among officers.

2 I agree with the majority that Garrison, rather than Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), provides the appropriate framework for determining the constitutionality of defendants' actions. (Majority Op. 12-13 & n.2.)

3 Contrary to the majority's assertion, searching Harman and Overton's home two additional times and detaining them for approximately two hours after discovering the separate apartment in which they were residing was not a garage cannot be classified as an "honest mistake." (Majority Op. 17-18 n.4, 23.)

4 The fact that Harman's name was listed on the gas utility statement for the main residence may be relevant to whether the warrant was overbroad when issued. But it assuredly is not relevant to the inquiry of whether probable cause continued to exist after officers

discovered the detached garage was a separate residence.

5 In addition to Pollock's hunch, the majority relies on the discovery of a small amount of marijuana to justify defendants' actions. The majority does recognize the evidence showing that the contraband was not discovered until after SERT members secured the home, but fails to legally credit the consequence of these facts in its analysis. (Majority Op. 19-20.) Viewing this evidence in the light most favorable to plaintiffs, the discovery occurred after defendants knew the "detached garage" was actually an apartment, which was immediate. Because police were obligated to withdraw as soon as they discovered the fact that they had entered an apartment, they were not "lawfully in a position from which the [marijuana] was in plain view"; thus the marijuana may not be considered. United States v. Angelos, 433 F.3d 738, 748 (10th Cir. 2006) (quotations omitted). Only by holding that the officers could continue their search until Harman and Overton proved that they were not "connected to the illegal activity" at the nearby home can the majority bring the seizure of the marijuana within the plain view exception. (Majority Op. 20.)

Case No. 2:03CV558 DAK

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH,
CENTRAL DIVISION

MELISSA HARMAN and JUSTIN OVERTON,
Plaintiffs,

vs.

BRENT POLLOCK, SCOTT BARNETT and JOHN
AND JANE DOES 1-15,
Defendants.

March 18, 2008, Decided
March 18, 2008, Filed

DALE A. KIMBALL, United States District Judge.

MEMORANDUM DECISION AND ORDER

This matter is before the court on (1) Plaintiffs' Motion for Partial Summary Judgment on Liability, (2) Defendants' Cross-Motion for Summary Judgment, and (3) Plaintiffs' Motion to Amend the Complaint. [1] A hearing on the motions was held on August 30, 2007. At the hearing, Plaintiffs Melissa Harman and Justin Overton were represented by Robert B. Sykes. Defendants Brent Pollock and Scott Barnett were represented by Matthew D. Bates. Before the hearing, the court considered carefully the memoranda and other materials submitted by the parties. Since taking the matter under advisement, the court has further considered the law and facts relating to the motions.

The court has also considered the following papers, which were filed after the August 30, 2007 hearing on the motions: Plaintiffs' Supplemental Memorandum in Support of Motion to Amend the Complaint, Defendants' Supplemental Memorandum in Opposition to the Motion to Amend Complaint, Defendants' Notice of Supplemental Authority, and Plaintiffs' Response Re: Notice of Supplemental Authority. Now being fully advised, the court renders the following Memorandum Decision and Order.

I. STANDARD OF REVIEW

Summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In reviewing the factual record, the court construes all facts and makes reasonable inferences in the light most favorable to the non-moving party. *See Byers v. City of Albuquerque*, 150 F.3d 1271, 1274 (10th Cir.1998).

In cases such as this, where a defendant invokes a qualified immunity defense, "the plaintiff bears the burden of satisfying a strict two-part test." *Camfield v. City of Okla.*, 248 F.3d 1214, 1225 (10th Cir. 2001). "First, the plaintiff must demonstrate that the defendant's actions violated a constitutional or statutory right. Second, the plaintiff must show that the constitutional or statutory rights the defendant allegedly violated were clearly established at the time of the conduct at issue." *Id.* at 1225-26 (internal quotations and citations omitted); *see also Wilson v.*

Layne, 526 U.S. 603, 609, 119 S. Ct. 1692, 143 L. Ed. 2d 818 (1999). Even if a plaintiff's constitutional rights were clearly defined at the time of the alleged violation, a defendant is entitled to qualified immunity if it was objectively reasonable for him to believe that his actions did not violate those rights. *Malley v. Briggs*, 475 U.S. 335, 344-45, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986).

II. BACKGROUND

This case was brought pursuant to 42 U.S.C. § 1983, alleging that Defendants improperly entered and searched Plaintiffs' residence without a warrant and then illegally detained Plaintiffs. Within two months after the Complaint was filed, Defendants filed a Motion for Qualified Immunity and Summary Judgment" on August 21, 2003. Plaintiffs requested a Rule 56(f) continuance to pursue discovery. On January 14, 2004, the Honorable Tena Campbell held oral argument on the Rule 56(f) motion and ultimately permitted Plaintiffs to conduct limited discovery into four narrow issues. [2] The court allowed short depositions (not to exceed 150 minutes) of seven individuals on four specific topics, which dealt primarily with the legality of the entry into the residence and whether there was knowledge of a second residence. The court subsequently permitted two additional people to be deposed. [3] When Plaintiffs filed their Memorandum in Opposition to Defendants' Motion for Summary Judgment, they also filed their own Motion for Summary Judgment. On August 5, 2004, the court heard oral argument on the motions, and on November 9, 2004, the court granted Defendants' Motion for Summary Judgment, finding that the officers were

entitled to qualified immunity on all claims asserted by Plaintiffs. [4]

Plaintiffs subsequently appealed the grant of qualified immunity to the Tenth Circuit Court of Appeals. On May 2, 2006, the Tenth Circuit affirmed the court's grant of qualified immunity as to Plaintiffs' claim of an unreasonable entry into 44 1/2 West 2700 South. The court found that the initial entry into the home was an objectively reasonable mistake. *Harman v. Pollock*, 446 F.3d 1069, 1076 (10th Cir. 2006). The Tenth Circuit, however, reversed and remanded the court's grant of qualified immunity to the officers with respect to the Plaintiffs' claims of an unlawful search and seizure, finding that "[m]aterial factual disputes exist as to the reasonableness of the subsequent search and detention of Ms. Harman and Mr. Overton." *Harman*, 446 F.3d at 1082. Specifically, the Tenth Circuit concluded that (1) "there are material facts in dispute as to the reasonableness of the officer's delay in realizing that they were in a separate residence not anticipated in the warrant"; (2) "there are material facts in dispute as to the reasonableness of the lengthy detention of the plaintiffs and when the officers' authority terminated"; and (3) "material facts remain in dispute as to the reasonableness of the detention of the plaintiffs and search of the garage apartment." [5] *Id.* at 1085-87. The Mandate was filed on May 26, 2006. [6]

On June 23, 2006, Plaintiffs moved for summary judgment on liability. [7] Plaintiffs essentially contended that the Tenth Circuit had made factual and legal determinations that compelled a finding of liability. Defendants filed a Motion to Strike Plaintiffs' Motion for Partial Summary Judgment on Liability and an

Alternative Rule 56(f) motion, pointing out that the Tenth Circuit had viewed the evidence in a light most favorable to Plaintiffs and that Plaintiffs had completely failed to address the factually disputed qualified immunity issues that remained. Defendants also sought leave to conduct more thorough discovery as to the specific issues identified by the Tenth Circuit. [8] On September 26, 2006, the court denied Plaintiffs' Motion and granted Defendants' motion, permitting the parties to conduct discovery. [9]

On March 19, 2007, Plaintiffs filed a Motion to Amend the Complaint. [10] On April 13, 2007, they filed a Motion for Partial Summary Judgment on Liability. [11] Defendants filed a Cross-Motion for Summary Judgment on May 15, 2007. [12] Oral argument was held on August 30, 2007, and the court took the motions under advisement. Supplemental authority was then filed by both parties. [13]

III. FACTS [14]

In mid-2002, the State Bureau of Investigation ("SBI") began investigating illegal drug trafficking by two Hispanic individuals known as Isabelle and Pawoo. Defendant Trooper Brent Pollock was assigned as the case agent. Defendant Sergeant Scott Barnett was his immediate supervisor. Working under cover, Pollock made contact with Isabelle through a confidential informant and made several controlled drug buys from Isabelle and Pawoo. During some of the drug buys, Isabelle had small children with her. After the buys, other SBI agents traced Isabelle to a house at 44 West 2700 South ("44 West") in South Salt Lake City, where she apparently resided.

Pollock and other SBI agents visited the address and observed a detached garage (the "rear building") at the back of the property. After his initial surveillance of the 44 West property, Pollock asked Joe Gomez, an intelligence analyst for SBI, to investigate ownership of the property, including utility and county records. Gomez discovered the following information about 44 West:

> a. It was owned by James B. Tucker, but Mr. Tucker lived at another address.
> b. Salt Lake County had designated the 44 West parcel for a single family dwelling.
> c. The Questar gas account at 44 West was under the name Melissa Harman.
> d. Two other people had listed 44 West as their address. Both had violent criminal histories.

Gomez did not find any evidence of a second residence on the property. He ran Harman's name through a subscription credit database and discovered that she had credit activity in New Mexico. He then ran her name through New Mexico's drivers license records and discovered that she had a current New Mexico drivers license with an address in Albuquerque. Gomez reported all of his findings to Pollock.

The Warrant

In early February 2003, Pollock drafted a no-knock search warrant and affidavit for 44 West. The warrant described the property to be searched as:

> 44 West 2700 South, South Salt Lake City, Utah, a white house, brown roof, front door faces

> south, small wood fence to the west of the door across the front, # 44 on the wall to the right of the front door, a *detached garage* to the rear of the house on the east side.

(emphasis added). The warrant authorized the search of the entire property, including "any and all outbuildings and curtilage of the property." The warrant described the persons to be searched as a Hispanic female, Isabelle, and a Hispanic male, Pawoo. The warrant authorized Defendants to search for drugs, drug distribution materials, drug paraphernalia, and records or papers showing residence or control of the premises. The affidavit attached to the warrant stated that Melissa Harman had listed 44 West 2700 South as her address.

Barnett assisted Pollock in drafting the warrant and affidavit. Pollock screened the warrant with Katie Bernard-Goodman, a Deputy Salt Lake County District Attorney. Ms. Goodman told Pollock that the warrant lawfully covered the rear building. Pollock presented the warrant and affidavit to Judge Sandra Peuler of the Utah Third District Court, who signed the warrant on February 4, 2003. Based on Ms. Goodman's review of the warrant and Judge Peuler's approval of the warrant, Pollock believed that the warrant was supported by probable cause and authorized him to search all buildings on the lot located at 44 West 2700 South. [3]

Because Defendants suspected that dangerous individuals were residing on the property, they contacted the Special Emergency Response Team ("SERT") to execute the warrant. SERT is a section

within the Utah Highway Patrol that, among other things, serves high-risk warrants. Three SERT officers scouted out the property at 44 West to determine the safest method to enter the buildings. During the reconnaissance, the scout team saw people entering the rear building. They also saw lights and heard voices in that building. The SERT scout team checked with the South Salt Lake City Planner's office and was told that the property at 44 West did not include a second residence. The scout team relayed this information to Pollock.

Executing the Warrant

At approximately 12:45 a.m. on February 12, 2003, SERT officers simultaneously entered the front and rear buildings at 44 West. SERT officers used a ram to force open the front door of the rear building. Upon entering the rear building, they found Melissa Harman and Justin Overton on a mattress in a bedroom. SERT officers observed marijuana and a pipe in plain view on the kitchen counter. The rear building was furnished with a kitchenette, a bathroom, a couch, a television, and a separate room with a mattress on the floor. SERT officers handcuffed Harman and Overton, escorted them to the couch, and covered them with a sheet or blanket.

It took approximately fifteen minutes for SERT to secure the entire property at 44 West, including the rear building. [8] After the property was secured, Pollock, Barnett, and several other SBI agents arrived to search for evidence and interview the suspects found on the property. Because Pollock had worked undercover during the investigation, he wore a mask

over his face and did not interact with any of the suspects found on the property. He waited on the edge of the property until the suspects, including Harman and Overton, were escorted to the detention van, which was parked in front of the property.

Barnett and the other SIU agents went first to the front building. They swapped the SERT officers' handcuffs for their own handcuffs and escorted the buildings' occupants to the containment van to await interviewing. Agent Cori Start, a female SIU agent, went to the rear building and helped Harman get dressed.[7] She and other SIU agents, including Barnett, then swapped Harman and Overton's handcuffs and escorted them to the containment van. At some point during this process, the agents learned Harman's and Overton's names and relayed those names to Pollock.

When Pollock learned that Harman had been found in the rear building, he remembered her name as the person on the gas account at 44 West. He suspected that she was involved in Isabelle and Pawoo's drug trafficking and that she was only temporarily in the rear building when the search occurred.[8] After officers took Harman and Overton to the van, Pollock entered the rear building and seized the marijuana and pipe on the counter. He also performed a cursory walk-through of the building to check for other drugs or weapons. While the other SIU agents searched the buildings, Barnett interviewed the suspects found in the front and rear buildings. He first interviewed Harman and Overton and asked them about the marijuana found in the rear building and about any association they might have to the people in the front building.

Harman and Overton claimed that they did not know the occupants of the front building and were not involved in any way with drug trafficking. Barnett then interviewed the occupants of the front building, who confirmed that Harman and Overton were not involved in illegal drug trafficking or otherwise associated with Pawoo and Isabelle. After interviewing all suspects found on the property, including Harman and Overton, Barnett advised Lieutenant Ed Michaud, the scene commander, that Harman and Overton did not appear to be involved in the drug trafficking. He recommended citing Harman and Overton for the marijuana and pipe found in the rear building and releasing them. Only a few minutes lapsed from the time Barnett verified Plaintiff's story and the time he told Michaud to cite them and release them.[3] Michaud agreed with Harman's recommendation, and at 2:35 a.m. he cited Harman and Overton, removed their handcuffs, and released them. Officers remained on the property at 44 West until approximately 3:30 to finish searching the front building and processing the remaining suspects.

Aside from answering a brief questions about the warrant, neither Pollock nor Barnett had any further interaction with Plaintiffs during the execution of the search warrant. When Pollock searched the rear building, he believed that building was accessible to and under the control of the occupants of the front building, that Harman and Overton resided in the front building, and that they just in the rear building "partying." Pollock did not interview or detain Plaintiffs in any way. When Barnett detained and interviewed Plaintiffs, he suspected that they were involved in drug trafficking and believed they were guilty of possession

of marijuana and drug paraphernalia. Barnett never searched the rear building.

Pollock and Barnett did not know that Harman and Overton lived in a separate residence that was unassociated with Isabelle and Pawoo's drug trafficking until Barnett finished interviewing all the suspects on the property.

IV. DISCUSSION

Despite the Tenth Circuit's finding that genuine issues of material fact precluded the grant of qualified immunity regarding the search and seizure, both parties contend that after additional discovery, no genuine issues of material fact remain.[20] Rather, each party contends that they are entitled to summary judgment.

A. POLLOCK AND BARNETT ARE ENTITLED TO QUALIFIED IMMUNITY BECAUSE THEY DID NOT VIOLATE PLAINTIFFS' FOURTH AMENDMENT RIGHTS.

Pollock and Barnett are entitled to qualified immunity for detaining Plaintiffs. As explained below, Barnett did not violate Plaintiffs' Fourth Amendment rights by detaining them, because he reasonably suspected that Plaintiffs were guilty of possessing a controlled substance and were linked to the drug dealing suspected at the property. These suspicions entitled Barnett to detain Plaintiffs while he pursued a reasonable investigation to confirm or dispel his suspicions. Pollock is entitled to qualified immunity

because he did not personally participate in Plaintiffs' detention.

Pollock and Barnett are also entitled to qualified immunity for searching Plaintiffs' dwelling. When Pollock searched the rear building, he did so pursuant to a valid warrant. He also believed that Plaintiffs were involved in trafficking drugs with Isabelle and Pawoo, and nothing he found before or during his search dispelled that belief. Barnett is entitled to qualified immunity as to the search because he did not personally participate in searching the rear building.

1. Pollock and Barnett had reasonable suspicion to detain Plaintiffs because they found Plaintiffs in possession of marijuana and because Plaintiffs had a demonstrable connection to a suspected drug house.

Plaintiffs assert that Pollock and Barnett unlawfully detained them for "an excessive period of time." The Tenth Circuit has already determined that the initial entry and seizure of Plaintiffs by the SERT team was reasonable. *See Harman v. Pollock*, 446 F.3d 1069, 1080-81 (10th Cir. 2006). The Tenth Circuit reversed and remanded the case, however, for this court to determine whether it was reasonable to continue to detain the Plaintiffs. *Id.* at 1089. The undisputed facts demonstrate Pollock had no role in detaining Plaintiffs and that Barnett detained the Plaintiffs only long enough to investigate his suspicions that Plaintiffs were involved in criminal activity. His detention of Plaintiffs was therefore reasonable and did not violate the Fourth Amendment.

a. Plaintiffs' detention was a proper investigatory detention as established by Terry v. Ohio.

Almost forty years ago, the U.S. Supreme Court held that law enforcement officers may detain a person on less than probable cause if the officer reasonably suspects that criminal activity is afoot. *See Terry v. Ohio*, 392 U. S. 1, 20, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). Such detentions may not be based on "inarticulate hunches." *Id.* at 22. But, "the likelihood of criminal activity need not rise to the level required for probable cause, and it falls considerably short of satisfying a preponderance of the evidence standard." *United States v. Arvizu*, 534 U.S. 266, 274, 122 S. Ct. 744, 151 L. Ed. 2d 740 (2002). In fact, "[a] determination that reasonable suspicion exists . . . need not rule out the possibility of innocent conduct." *Id.* at 277. There need only be articulable facts from which an officer can reasonably infer that criminal activity "may be afoot." *Terry*, 392 U.S. at 21, 30.

While *Terry* involved stopping an individual on the street, subsequent cases recognize that "the exception for limited intrusions . . . is not confined to the momentary, on the street detention accompanied by a frisk for weapons involved in *Terry* and *Adams*." *Sommers*, 452 U.S. at 700. Rather, the reasonableness of an investigatory detention is determined by the character of the intrusion and its justification. *Id.* at 701. Courts balance the need for the detention against the invasion the detention entails. *Terry*, 392 U.S. at 21. In balancing the interests of law enforcement and the detainee, the court weighs the facts against an objective standard. *Id.* at 21-22. An action is reasonable under the Fourth Amendment, regardless of the

individual officer's state of mind, "as long as the circumstances, viewed *objectively*, justify that action." *Scott v. United States*, 436 U.S. 128, 138, 98 S. Ct. 1717, 56 L. Ed. 2d 168 (1978). Thus, the proper inquiry is: "would the facts available to the officer at the moment of the seizure or search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?'" *Id.* at 21-22 (quoting *Carroll v. United States*, 267 U.S. 132, 162, 45 S. Ct. 280, 69 L. Ed. 543, T.D. 3686 (1925)).

Because the question of reasonableness is ultimately a balancing of interests, there is no time limit on an investigatory detention. *See United States v. Sharpe*, 470 U.S. 675, 685, 105 S. Ct. 1568, 84 L. Ed. 2d 605 (1985) (stating that "our cases impose no rigid time limitations on *Terry* stops"). Rather, courts must consider the law enforcement purposes served by the detention and the time reasonably needed to effectuate those purposes. *Id.* So long as officers are "diligently pursuing a means of investigation that [is] likely to confirm or dispel their suspicions quickly," a detention is reasonable. *Id.* at 686. Additionally, the court should avoid "unrealistic second guessing." *Id.* Officers unraveling facts in a swiftly developing situation may mistakenly choose the less-efficient of two alternative means of investigating the situation. But, their mistake does not render the detention unreasonable. *Id.* "The question is not simply whether some other alternative was available, but whether the police acted unreasonably in failing to recognize or pursue it." *Id.*

In this case, Barnett's detention of Plaintiffs was a justifiable investigatory detention. It was supported by reasonable suspicions of criminal activity, and it lasted

no longer that was necessary to confirm or dispel those suspicions.

b. Barnett reasonably suspected that Plaintiffs were involved in criminal activity and detained them no longer than was necessary to dispel his suspicions.

An objectively reasonable officer would have significant suspicion that Plaintiffs were engaged in criminal activity. First, Pollock and Barnett suspected that the rear building was being used by the occupants of the front building as a place to store and use drugs. Pollock had purchased drugs undercover from two Hispanic suspects living in the front building. He knew that those suspects had children. Three SERT officers, during their reconnaissance of the property, had seen lights and heard voices in the rear building. Those officers learned from South Salt Lake City, however, that the property was only zoned for one single family residence. With such facts, an objectively reasonable officer would connect the dots and suspect that the drug dealers resided in the front building and were using the rear building to store or use drugs away from the children.

Barnett's discoveries when he entered the rear building would confirm the suspicion of any reasonable officer that the rear building was a crash pad and that its occupants were associated with the suspects in the front building. He found marijuana and a pipe in plain view on the counter. Barnett also found Melissa Harman—one of the suspected residents of 44 West and the person responsible for the gas bill at the front building.

From these facts, an objectively reasonable officer could conclude that Harman resided in the front building, and was temporarily in the rear building to party and use drugs with Overton. A reasonable officer could further conclude that Harman was involved in drug trafficking with the Hispanic subjects of the warrant because she had ties to New Mexico. New Mexico has a high Hispanic population and is a border state through which drugs from Mexico might pass. Considering the totality of the circumstances, a reasonable officer would at least suspect that Harman was involved in illegal drug activity with the Hispanic suspects.

Given these suspicions, Plaintiffs' detention was reasonable. Barnett detained Plaintiffs only long enough to investigate their possession of drugs, their association with the other suspects, and their possible involvement in drug trafficking. This included interviewing the Plaintiffs, searching the premises for controlled substances and other evidence of drug trafficking, and checking their story against information from other suspects on the premises.

Once Barnett had confirmed Plaintiffs' story, he advised Lieutenant Michaud of his findings, and Michaud cited and released Plaintiffs. Barnett's questioning constitutes diligent pursuit of "a means of investigation that was likely to confirm or dispel [his] suspicions quickly." *Sharpe*, 470 U.S. at 686; *see also Summers*, 452 U.S. at 700 n.12 (noting that the most common investigative tool during a *Terry* stop is to interrogate the suspect and further noting that an officer may "communicate with others . . . in an effort to verify the explanation tendered").

A prudent officer would not simply take Plaintiffs' claims of innocence at face value and release them without further investigation. *See Hill v. California*, 401 U.S. 797, 802, 91 S. Ct. 1106, 28 L. Ed. 2d 484 (1971) (upholding arrest of suspect despite his protestations to police that he was not the suspect they were looking for). If Plaintiffs had been lying and were, in fact, involved in drug trafficking, releasing them would allow them to flee, destroy evidence, or possibly react violently. *See Summers*, 452 U.S. at 702-03. "[T]he execution of a warrant to search for narcotics is the kind of transaction that may give rise to sudden violence or frantic efforts to conceal or destroy evidence." *Id.* at 702. "The risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation." *Id.* at 703.

Inasmuch as Barnett had a ready means of confirming Plaintiffs' claims--questioning the other suspects--it was reasonable to keep Plaintiffs secure until he could verify their story. While this may have inconvenienced, humiliated, and embarrassed Plaintiffs, it was justified by Barnett's need to maintain control of the scene until he could be sure that Plaintiffs were not involved in illegal drug trafficking. Such are "the inconveniences we all expose ourselves to as the cost of living in a safe society." *Illinois v. Rodriguez*, 497 U.S. 177, 184, 110 S. Ct. 2793, 111 L. Ed. 2d 148 (1990).

Additionally, independent of the warrant, Defendants had reasonable suspicion to detain Plaintiffs. Plaintiffs were caught with drugs and drug paraphernalia, and they had an articulable connection to Isabelle and Pawoo's drug trafficking. Thus, under *Terry* and its

From these facts, an objectively reasonable officer could conclude that Harman resided in the front building, and was temporarily in the rear building to party and use drugs with Overton. A reasonable officer could further conclude that Harman was involved in drug trafficking with the Hispanic subjects of the warrant because she had ties to New Mexico. New Mexico has a high Hispanic population and is a border state through which drugs from Mexico might pass. Considering the totality of the circumstances, a reasonable officer would at least suspect that Harman was involved in illegal drug activity with the Hispanic suspects.

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Once Barnett had confirmed Plaintiffs' story, he advised Lieutenant Michaud of his findings, and Michaud cited and released Plaintiffs. Barnett's questioning constitutes diligent pursuit of "a means of investigation that was likely to confirm or dispel [his] suspicions quickly." *Sharpe*, 470 U.S. at 686; *see also Summers*, 452 U.S. at 700 n.12 (noting that the most common investigative tool during a *Terry* stop is to interrogate the suspect and further noting that an officer may "communicate with others . . . in an effort to verify the explanation tendered").

Jenkins v. Wood, 81 F.3d 988, 994 (10th Cir. 1996). "[I]t is not enough for a plaintiff to show a defendant was in charge of other state actors who actually committed the violation." *Id.* Rather, "plaintiff must establish a deliberate, intentional act by the supervisor to violate constitutional rights." *Id.* at 994-95.

In this case, Pollock did not authorize or otherwise participate in Plaintiffs' detention. Pollock never even spoke with or interacted with Plaintiffs. Instead, Sergeant Barnett took custody of Plaintiffs, interviewed them, and then recommend to the scene commander to release them with a citation. The instant case is similar to *Martinez v. Carr*, 479 F.3d 1292, 1295 (10th Cir. 2007). Martinez was detained under questionable authority by police at the state fair. *Id.* at 1293. He later sued Carr, whose only involvement in the detention was to issue Martinez a citation and release him. *Id.* at 1293-94. In reviewing a denial of qualified immunity, the Tenth Circuit noted that Carr had not confronted, stopped, or seized Martinez in any way. *Id.* at 1295. The court held that merely issuing a citation did not constitute a seizure under the Fourth Amendment and granted Carr qualified immunity. *Id.* at 1299. Similarly, Pollock did not confront, stop, or seize Plaintiffs in any fashion. In fact, Plaintiffs admit that they had never seen Pollock before their depositions in this case. Pollock is entitled to qualified immunity because he did not personally participate in Plaintiffs' detention. *See Martinez*, 479 F.3d at 1299.

2. Pollock and Barnett had probable cause and a valid warrant to search Plaintiffs' dwelling.

Plaintiffs assert that Defendants violated their Fourth Amendment rights by searching the rear building without probable cause and without a valid warrant. The Tenth Circuit has already ruled that officers lawfully entered the rear building pursuant to a valid warrant. *See Harman*, 416 F.3d at 1080-81. On remand this court must determine what searches occurred after the initial entry and whether those searches were lawful. *Id.* at 1089.

Discovery conducted after Plaintiffs' appeal resolved the question of whether a search occurred after the initial entry. Once Barnett escorted Plaintiffs to the containment van, Pollock entered the rear building and seized the marijuana and pipe. He also performed a cursory walk-through of the building to check for other drugs or weapons. This court must now determine whether Pollock's search was lawful.

The court finds that Pollock did not violate Plaintiffs' Fourth Amendment rights when he searched the rear building because he had a valid warrant supported by probable cause. Finding drugs and Melissa Harman in the rear building added to probable cause.

a. Officers may rely on a warrant so long as they reasonably believe the warrant is supported by probable cause.

Police do not offend the Fourth Amendment when they reasonably rely on a facially valid warrant. *See United States v. Leon*, 468 U.S. 897, 919-21, 104 S. Ct. 3405, 82

L. Ed. 2d 677 (1984); *Massachusetts v. Sheppard*, 468 U.S. 981, 989-90, 104 S. Ct. 3424, 82 L. Ed. 2d 737 (1984). 'In the ordinary case, an officer cannot be expected to question the magistrate's probable cause determination or his judgment that the form of the warrant is technically sufficient.' *Leon*, 468 U.S. at 921. Just as an officer must accept a magistrate's determination that a warrant form is invalid, an officer may rely on a magistrate's approval of a warrant. *Sheppard*, 468 U.S. at 990.

An officer's right to rely on a valid warrant is not, however, absolute. The United States Supreme Court recognized in *Leon* that 'the officer's reliance on the magistrate's probable-cause determination and on the technical sufficiency of the warrant must be objectively reasonable.' *Leon*, 468 U.S. at 922. A few federal circuit courts have addressed the question of whether officers reasonably relied on a magistrate's probable cause determination after discovering new facts that altered the probable cause analysis. *See United States v. Perez*, 484 F.3d 735, 2007 WL 1065784 (5th Cir. 2007); *United States v. Bowling*, 900 F.2d 926, 932 (6th Cir. 1990); *United States v. Maron-Buitrago*, 734 F.2d 889, 894-96 (2d Cir. 1984). These courts have held that officers may continue with the search so long as the new facts do not dispel probable cause. *See Perez*, 484 F.3d 735, 2007 WL 1065784, at *5-7 (holding that discovery during search that multiple people had access to Perez's computer did not dispel probable cause to believe that Perez was person responsible for child pornography on computer); *Bowling*, 900 F.2d at 934 (holding that fruitless consent search performed while officers were seeking warrant did not dispel probable cause basis for warrant because search was cursory and did not cover all areas

authorized by warrant); *Marin-Buitrago*, 734 F.2d at 895 (holding that claims by suspect that he was not the person officers were looking for did not dispel probable cause to search his apartment). If, however, the new facts completely dispel probable cause, officers may not begin or continue their search. *See Maryland v. Garrison*, 480 U.S. 79, 87, 107 S. Ct. 1013, 94 L. Ed. 2d 72 (1987) (holding that officers properly discontinued search when they discovered that third floor apartment they were searching was, in fact, two separate apartments and that suspect had no access or control over second apartment).

In this case, Pollock and Barnett found that people they believed to be residents of the front building were partying and using drugs in the rear building. As explained below, these new facts supported the warrant and the underlying probable cause determination. Pollock thus properly searched the rear building pursuant to the authority granted by the search warrant. This case is unlike *Garrison* in that the undisputed facts demonstrate that it did not become clear that the officers were in a residence that was not anticipated by the warrant until after the search of the rear building and the front building and the questioning of all people found on the premises.

b. Probable cause is common-sense, practical determination that there is a fair probability that evidence of a crime will be found in a particular place.

Probable cause is present when the totality of the circumstances suggest a fair probability that evidence of a crime will be found in a particular place. *Illinois v.*

Gates, 462 U.S. 213, 230, 234-38, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983). In *Gates*, the Court held that "[t]he task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Id.* at 238 (emphasis added). The Court explained that in dealing with probable cause, courts simply deal with probabilities--"'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'" *Id.* at 231 (quoting *Brinegar v. United States*, 338 U.S. 160, 175, 69 S. Ct. 1302, 93 L. Ed. 1879 (1949)).

The facts supporting probable cause need not rule out innocent explanations. *Id.* at 244 n.13. Innocent behavior frequently will provide the basis for a showing of probable cause. *Id.* "In making a determination of probable cause the relevant inquiry is not whether particular conduct is 'innocent' or 'guilty,' but the degree of suspicion that attaches to particular types of non-criminal acts." *Id.*

c. Pollock had probable cause to search the rear building.

Pollock had probable cause to search the rear building. He suspected that Isabelle and Pawoo were using the rear building to store and use drugs outside the presence of their children. He also suspected that Melissa Harman might somehow be involved in Isabelle and Pawoo's drug trafficking because she was listed as a resident of the property, had set up the Questar gas account at their home, and was paying the gas bill.

When Pollock learned that officers had found Melissa Harman in possession of drugs and asleep in the rear building, it confirmed his suspicions that the rear building was being used as a crash pad to store and use drugs. He did not learn that Harman and Overton had no connection to Isabelle and Pawoo until after Barnett had interviewed Harman and Overton and verified their story with the occupants of the front building. But that did not occur until after Pollock had already searched the rear building.

The mere discovery of indicia of dwelling in the rear building did not, in this case, dispel probable cause. Pollock and Barnett knew that South Salt Lake City had designated the property at 44 West as a single-family dwelling. There was no separate numbering or lettering on the rear building to indicate that the rear building was a separate residence. The warrant listed the "detached garage" in the description of the place to be searched, and it authorized the search of "any and all outbuildings and curtilage of the property." A converted garage used by the front building occupants to store and use drugs fit precisely the warrants description of the property to be searched.

Pollock and Barnett also knew that drug users and traffickers commonly use an outbuilding, separate from their main residence, to store, use, and manufacture drugs. These buildings commonly contain sinks, stoves, beds or cots, personal items, etc. Were a magistrate to reevaluate the warrant with the information Pollock had at the time he performed his search, the magistrate would approve the warrant to search the rear building. *See Marin-Buitrago*, 734 F.2d at 895. Harman's presence in the rear building suggested that the

residents of the front building had access to and control over the rear building. Moreover, drugs, the very object Pollock and Barnett were seeking with the warrant, were found in the rear building. The rear building thus appeared to be a crash pad for the occupants of the front building. The indicia of a dwelling did not so thoroughly disprove this idea as to dispel probable cause, and a reasonable officer would believe that the warrant was still supported by probable cause and would search the rear building.

d. Pollock's search of the rear building was justified by exigent circumstances.

Pollock's search was also justified under the exigent circumstances exception to the warrant requirement. In most cases, a search performed without a warrant is unreasonable. *See Illinois v. McArthur*, 531 U.S. 326, 330, 121 S. Ct. 946, 148 L. Ed. 2d 838 (2001). Warrantless searches are permissible, however, upon a showing of special law enforcement needs, i.e. exigent circumstances. *Id.* at 330; *Terry*, 392 U.S. at 20. One well-settled circumstance in which exigency exists is when officers reasonably believe that the delay necessary to obtain a warrant will risk the destruction of evidence of a crime. *See Schmerber v. California*, 384 U.S. 757, 770, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966); *State v. Ashe*, 745 P.2d 1255, 1258 (Utah 1987).

In this case, when Pollock and Barnett entered the rear building, they immediately developed probable cause to search the building. In plain view they found drugs and a person, Melissa Harman, who was connected to a known drug house. A reasonable officer would believe that a further search of the rear building might uncover

drugs, paraphernalia, evidence of drug trafficking, such as ledgers, notebooks, scales, etc., and evidence linking Plaintiffs to the front building, such as utility bills or property records.

Because Plaintiffs already knew that police were aware of their drug involvement, exigent circumstances justified a warrantless search. Had Pollock and Barnett released Plaintiffs and sought a warrant to search the rear building, any evidence could have been destroyed by the suspects.

c. There is no evidence that Barnett searched the rear building.

Barnett is entitled to qualified immunity from Plaintiffs' claims that he unlawfully searched the rear building because Barnett did not search that building. As explained above, a government actor is only liable for violating a person's rights under § 1983 if he personally participates in the violation. Section 1983 plaintiffs may not rely on principles of *respondeat superior* to create liability. Barnett's role in this case was limited to detaining the occupants of the property and interviewing them to determine their involvement in drug trafficking. At no time did Barnett search the rear building.

B. POLLOCK AND BARNETT ARE ENTITLED TO QUALIFIED IMMUNITY BECAUSE PLAINTIFFS' CLAIMS ARE NOT GROUNDED IN CLEARLY ESTABLISHED LAW.

Plaintiffs assert that Pollock and Barnett were put on notice as soon as they entered the rear building that it

was a separate residence that may have been erroneously included in the warrant. They conclude from that assertion that the law required Pollock and Barnett to release Plaintiffs and retreat from the rear building within two to three minutes of entering the rear building. As explained below, Pollock and Barnett are entitled to qualified immunity from Plaintiffs claims because Plaintiffs' theories of liability are not clearly established law.

1. Police officers are entitled to qualified immunity from claims that are not grounded in clearly established law.

As noted above, Defendants Barnett and Pollock detained Plaintiffs and searched the rear building consistent with the information available at the time and in furtherance of a valid warrant. Accordingly, there has been no violation of Plaintiff's rights under the Fourth Amendment. Each of the Defendants is therefore entitled to qualified immunity and the claims against him should be dismissed as a matter of law.

But even if Plaintiff could show a Fourth Amendment violation, Defendants would each be entitled to qualified immunity because Plaintiffs' rights in this situation, as articulated in the law, were not so clearly established so as to put either Defendant on notice that the brief detention and cursory search somehow violated Plaintiff's rights.

Whether Plaintiff's rights were clearly established in February 2003, must be analyzed in the specific context of this case, not as a broad general proposition. The Supreme Court has emphasized that "the right the

official is alleged to have violated must have been 'clearly established' in a more particularized and hence more relevant sense: the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson*, 483 U.S. at 640. In *Saucier*, the Supreme Court noted that "the relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier*, 533 U.S. at 202.

The Tenth Circuit has held that, "in order for the law to be clearly established, there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other Courts must have found the law to be as the Plaintiff maintains." *Medina v. City and County of Denver*, 960 F.2d 1493, 1498 (10th Cir. 1992). In this case, there are no Tenth Circuit or Supreme Court cases that clearly establish Plaintiffs' theories of liability. Defendant are thus entitled to qualified immunity.

2. No clearly established law prohibited Plaintiffs' detention on reasonable suspicion of criminal activity.

As explained above, the law is clear that officers may detain individuals on suspicion of criminal activity. *See, e.g. Terry*, 392 U.S. at 20; *Adams v. Williams*, 407 U.S. at 144; *Brignoni-Ponce*, 422 U.S. at 881; *Wardlow*, 528 U.S. at 124-26; *Michigan v. Summers*, 452 U.S. at 704-05. At least one federal court has applied *Terry* to uphold the detention of a house's occupant after a search of that house pursuant to a warrant was

completed. *See United States v. McEaddy*, 780 F. Supp. 464, 472 (E.D. Mich. 1991) (analyzing detention of occupant under *Terry v. Ohio* where justification for detention under *Michigan v. Summers* had ended). Under *Terry* and its progeny, Barnett's detention of Plaintiffs was reasonable in light of his suspicions that they were involved in drug trafficking.

Plaintiffs argue, however, that Pollock and Barnett had a duty, under *Maryland v. Garrison*, 480 U.S. 79, 107 S. Ct. 1013, 94 L. Ed. 2d 72 (1987), to release them. Plaintiffs claim that *Garrison* required their immediate release, regardless of any independent suspicion officers had that Plaintiffs were engaged in criminal activity. The court finds that there was not well-established law that guided Defendants as to how to proceed in these specific circumstances. First, *Garrison* is inapposite to the detention issue in this case. In *Garrison*, the Supreme Court decided only whether the *search* of Garrison's apartment was proper. *Garrison*, 480 U.S. at 86-89. It did not consider any detentions that may have occurred in conjunction with that search.

Since *Garrison*, circuit courts have considered the legality of occupant detentions in conjunction with an alleged *Garrison* violation. *See, e.g., Liston v. County of Riverside*, 120 F.3d 965, 977-78 (9th Cir. 1997) (holding that officers' authority to detain occupants of house under *Michigan v. Summers* ended when officers learned that suspects in search warrant had sold house and moved). Those cases have held, correctly, that when officers discover that they are in an area erroneously included in the warrant, their authority to detain people connected to that area under the warrant as per *Summers* and *Muehler* is rescinded. *Id.*

But those cases do not make the law clear in this case. *Liston* and its companion cases involved circumstances in which the warrant was the only basis for detaining the suspects. They only considered, therefore, officers' categorical authority to detain under *Summers* and *Muehler*. In this case, Pollock and Barnett did not need to rely on their categorical authority to detain people under *Summers* and *Muehler*. They had independent reasonable suspicion to hold Plaintiffs based on their possession of marijuana and their possible connection to Isabelle and Pawoo's drug trafficking. Neither the Tenth Circuit nor the Supreme Court has ever suggested that officers may not detain occupants under *Terry*, even though they might lack clear authority under *Summers* and *Muehler*. That is, there is no clearly established law to guide officers who discover an unexpected dwelling while executing a valid search warrant but who also find reasonable suspicion independent of the warrant to detain the occupants of the dwelling. Thus, Pollock and Barnett are entitled to qualified immunity from Plaintiffs' claim of an unlawful detention.

3. No clearly established law prohibited Pollock's search of Plaintiffs' dwelling.

Pollock and Barnett are also entitled to qualified immunity regarding Plaintiffs' claims that they unlawfully searched the rear building because the law is not clearly established. As explained above, when officers discover new facts before or during the execution of a warrant that would affect a magistrate's probable cause determination, they may commence or continue the search, so long as the new facts do not dispel probable cause. *See United States v. Perez*, 484

F.3d 735, 2007 WL 1065784 (5th Cir. 2007); *United States v. Bowling*, 900 F.2d 926, 932 (6th Cir. 1990); *United States v. Marin-Buitrago*, 734 F.2d 889, 894-96 (2d Cir. 1984).

Plaintiffs nevertheless claim that Pollock's search was unlawful under *Maryland v. Garrison*, 480 U.S. 79, 107 S. Ct. 1013, 94 L. Ed. 2d 72 (1987). But *Garrison* did not involve the same facts as were present in this case. In *Garrison*, Baltimore police officers obtained a warrant to search the third floor apartment of Lawrence McWebb. *Id.* at 80. During the search, they discovered that the third floor was in fact two separate apartments, one occupied by McWebb and the other by Garrison. *Id.* Officers had no reason to suspect that evidence of McWebb's criminal activities would be found in Garrison's apartment. Thus, they stopped the search and withdrew from Garrison's apartment. *Id.* at 81.

Unlike the officers in *Garrison*, the officers in this case did not enter the purported garage and conclude with certainty that they were in a building not described in the warrant. Rather, the officers entered a building that they believed was covered by the warrant and were puzzled to discover some-but not conclusive-evidence of an entirely separate living area that was not anticipated by the warrant. In this situation, the officers were not required to simply leave due to the ambiguity surrounding the nature of this living area. Pollock and Barnett had probable cause to believe that the occupants of the front building had access to and control over the rear building (which was included in the warrant) and were storing and using drugs therein. Their belief was not diminished by what they found

upon entering the rear building; rather, it was strengthened. Specifically, Pollock and Barnett found drugs in the rear building, and they also found Melissa Harman, whom they believed resided in the front building with the Isabelle and Pawoo. This new information did not contradict their belief that the occupants of the front building were using and possibly storing drugs in the rear building. That supports probable cause rather than dispels it. Given the specific circumstances involved in this case, there was no clearly established law to guide the officers' conduct.

C. DEFENDANTS ARE ENTITLED TO QUALIFIED IMMUNITY BECAUSE THEIR CONDUCT WAS OBJECTIVELY REASONABLE

Even if they technically violated Plaintiffs' Fourth Amendment rights, Defendants are nonetheless entitled to qualified immunity because their actions were objectively reasonable in the circumstances. At the time that they conducted the search of the rear building and detained Plaintiffs for questioning, Defendants believed that they were acting under the authority of a valid warrant supported by probable cause and that their actions were legal and not a violation of Plaintiffs' rights.

The Supreme Court has recognized that, "[i]t is sometimes difficult for an officer to determine how the relevant legal doctrine will apply to the factual situation the officer confronts. An officer might correctly perceive all of the relevant facts but have a mistaken understanding as to whether his actions are legal in those circumstances. *Saucier* 533 U.S. at 205. If the officer's mistake is reasonable, the officer is entitled

to qualified immunity. *Id.* Courts should not find a constitutional violation where officers have reasonable but mistaken beliefs as to the facts establishing probable cause or exigent circumstances. *Id.* at 206. But, the court held, "even if a court were to hold that the officers violated the Fourth Amendment by conducting an unreasonable, warrantless search, *Anderson* still operates to grant officers immunity for reasonable mistakes as to the legality of their actions." *Id.*

Under this prong of the qualified immunity analysis, the actions of Officers Pollock and Barnett were objectively reasonable, and they are entitled to qualified immunity. Objective reasonableness is evaluated based upon the information the officers had when the conduct occurred. *Id.* at 207. At the time of the detention of Plaintiffs and the search of the rear building, Defendants had a host of information that would lead reasonable officers to conclude that the search and detention of Plaintiffs was justified. Officers Pollock and Barnett held a valid warrant that included "a detached garage to the rear of the house on the east side" and commanded them to search "the above-named or described... property, including any and all out buildings and curtilage of the property." The warrant directed them to search for "controlled substances "and" paraphernalia and containers used in the measuring, packaging, transportation use and/or sale of controlled substances." The warrant had been supported by information gathered by an intelligence analyst in a prior investigation, had been reviewed by a deputy District Attorney, and signed by a Third District Judge.

When the search team entered the rear building, they indeed found "controlled substances" and "paraphernalia" used in drug activity. They also found Melissa Harman who was listed as a resident of the premises and the person responsible for certain utilities at the property. In short, Defendant officers found exactly what their prior investigation and valid search warrant led them to expect.

Having found drugs and named persons associated with the suspected drug trafficking at the property, reasonable officers following the guidance of the Supreme Court in *Terry*, *Leon*, *Summers*, *Muehler* and other cases would act as authorized by the warrant to further the search of the property and investigate the people found there to determine their involvement in the suspected drug trafficking or other illegal activity.

If conducting the investigation was constitutionally improper, it was nevertheless reasonable in the circumstances. The circumstances "revealed" substantial grounds for the officers to have concluded they had legitimate justification under the law for acting as they did, and accordingly, their interpretation of the legality of their action was reasonable. *Holland ex rel. Overdorff v. Harrington*, 268 F.3d 1179, 1196 (10th Cir. 2001).

Qualified Immunity "shields an officer from suit when she makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances she confronted." *Brosseau v. Haugen*, 543 U.S. 194, 198, 125 S. Ct. 596, 160 L. Ed. 2d 583 (2004). At the very worst, Defendant officers misapprehended the legality of their search and

detention. If they indeed made a mistake, that mistake was objectively reasonable. [21] Accordingly, Defendant officers are entitled to qualified immunity.

V. CONCLUSION

Accordingly, IT IS HEREBY ORDERED that Plaintiffs' Motion for Partial Summary Judgment on Liability [docket # 125] is DENIED. Defendants' Cross-Motion for Summary Judgment [docket # 133] is GRANTED, and Plaintiffs' claims are DISMISSED. Plaintiffs' Motion to Amend the Complaint [docket # 115] is DENIED. The Clerk of Court is directed to close this case.

DATED this 18th day of March, 2008.

BY THE COURT:
/s/ Dale A. Kimball
DALE A. KIMBALL
United States District Judge

Footnotes

1 Plaintiffs seek to name an additional Defendant in this case. The court denies this motion because the four-year statute of limitations has run. *See Sheets v. Salt Lake County*, 45 F.3d 1383, 1387 (10th Cir. 1995).

2 *See docket ## 23, 24*

3 *See docket # 29*

4 *See docket # 57*

5 The *Harman* court did not consider the issue of whether Defendants had probable cause to detain and arrest Plaintiffs because "[t]his argument was not raised before or ruled upon by the trial court, and we decline to address it here." *Id.* at 1089.

6 *See docket # 67*

7 *See docket # 76*

8 *See docket # 80*

9 *See docket # 90*

10 *See docket # 115*

11 *See docket # 125*

12 *See docket # 133*

13 *See docket ## 144-147*

14 In their memoranda, Plaintiffs purport to dispute many of Defendants' facts. The court finds that none of the purported disputes, however, is material to the resolution of these motions and/or that Plaintiffs have failed to sufficiently dispute the fact by pointing to contradictory evidence in the record. In most cases, Plaintiffs dispute is based on semantics or the way in which Defendants' fact was characterized. When appropriate, the court has restated the facts that Plaintiffs contend were overstated or mischaracterized.

15 Throughout their briefing, Plaintiffs have referred to Harman's residence as "44 1/2 West," and they have

included pictures of the residence with house numbers "44 1/2 West." It is undisputed, however, that no such numbers were on the rear residence at the time of obtaining or executing the warrant and that the officers had no indication that a "44 1/2 West" address existed at the time of the events at issue.

16 Plaintiffs dispute this fact as misleading and inaccurate because, they claim, it "could not possibly have taken 15 minutes to secure 'the rear building.'" The court notes, however, that Plaintiffs have failed to dispute Defendants' statement that it took approximately fifteen minutes to secure *the entire property at 44 West, including the rear building.*

17 Plaintiff dispute that it was agent Cori Start who helped Harman get dressed. The court finds this dispute immaterial.

18 Plaintiffs dispute this fact as an overstatement of Pollock's deposition testimony. The court finds that it is not inconsistent with his testimony. He testified that when he heard Melissa Harman's name as someone who was found on the property, it "brought it more together" that "maybe she was intertwined with this." Pollock Depo. of 11/29/06 at 15-16.

19 Plaintiffs claim that this is a "gross distortion." Plaintiffs' disagreement, however, is misplaced because Plaintiffs focus on the time between when their interviews started and when they were released. They do not have any evidence to create a dispute about the time that elapsed between the time when Barnett verified their story and told Michaud to cite and release them. To the extent Plaintiffs complain that significant

time elapsed between when Michaud cited them and when he released them, the court finds it immaterial because Michaud is not a Defendant in this lawsuit.

20 The court recognizes that the Tenth Circuit remanded this case based on its determination that there were several disputed facts that precluded the grant of qualified immunity. By entertaining the instant motions for summary judgment, the court does not mean to disregard the Tenth Circuit's instructions. The court believes, however, that the Tenth Circuit did not intend to preclude consideration of such motions, given (1) the altered landscape of this case after significant additional discovery was conducted after remand, (2) that both parties agree that no material issues of fact remain, and (3) that new arguments have been developed that were not addressed on appeal. Indeed, the Tenth Circuit stated that "[t]he district court may make further findings on this claim." *Harman*, 446 F.3d at 1088; *see also id.* at 1089 (noting that "[t]he district court may make findings and hold additional hearings regarding officers' alternative arguments concerning the officers' authority to detain the plaintiffs, and the applicability of the plain view doctrine.")

21 In *Garrison*, the court recognized that "'[b]ecause many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability.'" *Garrison*, 480 U.S. at 87 n.11 (quoting *Brinegar v. United States*, 338 U.S. 160, 69 S. Ct. 1302, 93 L. Ed. 1879 (1949)).

No. 04-4294
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MELISSA HARMAN and JUSTIN OVERTON,
Plaintiffs-Appellants,

v.

BRENT POLLOCK, Officer, Department of Public Safety, State Bureau of Investigations; and SCOTT BARNETT, Officer, Department of Public Safety, State Bureau of Investigations;
Defendants-Appellees.

May 2, 2006, Filed

COUNSEL: Robert B. Sykes (with Kevin M. Sheff on the briefs), Robert B. Sykes & Associates, P.C., Salt Lake City, Utah, for Plaintiffs-Appellants.

Debra J. Moore (with Nancy L. Kemp, Assistant Attorney General, J. Clifford Petersen, Assistant Attorney General and Mark L. Shurtleff, Attorney General, on the brief), Assistant Attorney General, Salt Lake City, Utah, for Defendants-Appellees.

Before HENRY, EBEL, and TYMKOVICH, Circuit Judges.

OPINION

PER CURIAM.

Melissa Harman and Justin Overton rented and resided in the garage apartment at 44 1/2 West 2700 South in South Salt Lake, Utah. Defendant Brent Pollock, a narcotics agent with the Utah Department of Public Safety's Bureau of Criminal Investigations, had been investigating and observing the residents of the adjacent 44 West 2700 South for drug dealing. Defendant Scott Barnett was a Sergeant with the Utah Department of Public Safety.

On February 12, 2003, pursuant to a search warrant for 44 West 2700 South, a Special Emergency Response Team (SERT) of the Utah Highway Patrol and Special Weapons and Tactics Team (SWAT) prepared and executed an operations plan that encompassed a midnight raid of both residences. The raid resulted in the detention of the plaintiffs Ms. Harman and Mr. Overton for at least an hour and a half before they were released. As a result, the plaintiffs filed a 42 U.S.C. § 1983 action against defendants, alleging violations of their Fourth Amendment rights to be free from unlawful searches and seizures. The district court granted qualified immunity to each defendant, and dismissed the claims.

The plaintiffs now appeal, and, for the reasons stated below, we affirm in part and reverse in part.

I. FACTUAL BACKGROUND

A. 44 West 2700 South

Agent Pollock began investigating Ignacio Ascention (known to Agent Pollock at the time only as "Pawoo") and Conception Rodriguez (known to Agent Pollock at the time only as "Isabel") in late July of 2002. He suspected they were dealing heroin and cocaine. Acting undercover, Agent Pollock made several drug purchases from them.

On January 30, 2003, Agent Pollock learned from his colleague, Agent Cori Start, of Pawoo's and Isabel's residence at 44 West 2700 South, and thereafter observed the house from a pick-up truck parked nearby. Agents Pollock and Start watched the house for several days. During this time, Agent Pollock noticed a detached garage located to the side and rear of the house, and Agent Start also noted two mailboxes on the front of the 44 West 2700 South structure.

Agent Pollock observed that Pawoo and Isabel only entered into and exited from the 44 West 2700 South house. He noted that they drove exclusively either a silver Geo Tracker or a black Oldsmobile Cutlass. According to Agents Pollock and Start, the suspects did not use any of the other cars parked on the property.

B. 44 West 2700 South record search

On January 30, 2003, Agent Pollock telephoned Joe Gomez, a Criminal Information Specialist for the Utah Bureau of Investigations, and requested that Mr. Gomez "run a search on the property and the residents

of the home." Aplts' App. vol. IV, at 1308 (Dist. Ct. Order, dated Nov. 9, 2004) (internal quotation marks omitted). Agent Pollock explained to Mr. Gomez that there was a detached structure on the property. *Id.* vol. II, at 543. Mr. Gomez's search revealed that James Byron Tucker owned the property, and that Mr. Tucker leased the property to tenants. Mr. Gomez's review of the Questar Gas records indicated that the gas account for 44 West 2700 South was listed under the name of Melissa Harman. After obtaining Ms. Harman's social security number, he learned that she had a New Mexico driver's license and credit activity in New Mexico.

The Salt Lake County Recorder's Office listed 44 West 2700 South as a single family dwelling that included a detached structure. The records indicated that the detached structure was built in 1954 and contained a "finished main floor," built in 1963. *Id.* vol. IV, at 1309 (internal quotation marks omitted). Agent Pollock recalls discussing the property description with Mr. Gomez, who informed him that the property "was two plots of land divided roughly in the middle." *Id.* vol. II, at 539. The property description from the county assessor also indicated that the property encompassed "LOTS 44 & 45." *Id.* at 516-17.

Agent Pollock does not recall reviewing the 1987 deed of trust for the property. The deed described the property as follows:

> LOTS 44 AND 45, BLOCK 1, SOUTH GATE PARK PLAT "A," ACCORDING TO THE PLAT THEREOF, AS RECORDED IN THE OFFICE OF THE COUNTY RECORD OF SAID COUNTY.

Id. at 508.

Agent Pollock recalls discussing with Mr. Gomez the gas bill and the bill payor, Melissa Harman. Mr. Gomez told him "that she's the one that applied with Questar to get the gas hookup to the home." *Id.* at 540. Agent Pollock recalls that either he or Mr. Gomez mentioned seeing a white vehicle with New Mexico license plates in the driveway of 44 West 2700 South. Agent Pollock stated that he did not think Melissa Harman was the woman he had been investigating, but, after seeing the New Mexico plates, he "just assumed that it was [Ms. Harman's] vehicle." *Id.* at 542. Despite these apparent inconsistencies, Agent Pollock did not run a check on these plates, nor did he instruct anyone to run a search on these plates. *Id.* at 527, 542.

Mr. Gomez also reported that two other individuals indicated they resided at 44 West 2700 South, Benjamin Paul and Williams Fawcett. Subsequent investigation revealed that Mr. Paul and Mr. Fawcett each had criminal felony records.

C. The affidavit and search warrant

Given his surveillance and purchases from Pawoo and Isabel, Agent Pollock drafted an affidavit in support of an application for a search warrant. The affidavit described Isabel as a Hispanic female with red hair and brown eyes, and Pawoo as a Hispanic male with black hair and brown eyes. Agent Pollock conferred with District Attorney Katherine Bernards-Goodman, who reviewed the draft affidavit, and asked her about searching the garage. He stated he was trying to "find out if [he] had legal rights to go through the garage" but

"wanted to make sure since [the garage] was on the same property . . . that . . . with [his] training and with [his] past knowing that people store things in the garage, was it acceptable under the same search warrant to go through the garage because it was detached." *Id.* at 547. District Attorney Bernards-Goodman asked if there were any indicia that a second residence was on the property, such as separate address numbers or a separate mailbox. According to the district court, Agent Pollock told her he was "not aware of any indicia of a second residence." *Id.*, vol. II, at 854.

One February 4, 2003 Agent Pollock submitted the proposed search warrant and affidavit to a Utah state court judge. The application described the property to be searched as:

> 44 West 2700 South, South Salt Lake City, Utah, a white house, brown roof, front door faces south, small wood fence to the west of the door across the front, # 44 on the wall to the right of the front door, a *detached garage to the rear* of the house on the east side

Id. at 485 (emphasis added). The search warrant, issued the same day, described the property identically to the affidavit. The search warrant authorized the officer to search the property described, "including any and all outbuildings and curtilage of the property." *Id.* at 724. Agent Pollock was aware that the detached garage itself had an addition (the 1963 finished main floor). He stated that he knew that an attachment to the garage existed before the execution of the warrant.

After he obtained the search warrant, Agent Pollock learned of the violent criminal backgrounds of Mr. Paul and Mr. Fawcett, who purportedly lived at 44 West 2700 South. Accordingly, Officer Pollock then contacted the SERT/SWAT officers to arrange for their assistance in the execution of the warrant.

4. The SERT/SWAT team's Operations Order

Three SERT/SWAT officers formed a scout team to investigate and surveil 44 West 2700 South. The scout team members reported they heard voices coming from the detached structure, observed lights on in the structure during the evening, and had seen individuals entering and exiting the garage. They also commented about the number of cars on the property. Scout member Officer Donovan Lucas testified that he told Agent Pollock that "we've seen people going in there, are we sure that this is the primary residence?" to which Agent Pollock responded, "Yes, I've already double-checked that." *Id.* vol. II, at 584.

As the district court noted,

> Agent Pollock told Sergeant Barnett that the scout team members believe[] or [sic] someone may be using the outbuilding. Sergeant Barnett, upon consulting with Lieutenant Lloyd Edward Michaud about the observed use of the outbuilding, told Agent Pollock to contact the district attorney's office for advice. Agent Pollock told Sergeant Barnett he had already consulted a district attorney, who said the outbuilding could be legally searched with the search warrant.

Id. vol. IV, at 1312. Sergeant Barnett's declaration indicates that "Agent Pollock advised [him]" that the district attorney's office told him "the outbuildings could be legally searched with the Search Warrant." *Id.* vol. II, at 619. Agent Pollock does not recall using the term "outbuildings," but "probably said *garage*." *Id.* at 557.

Agent Pollock told the scout team it could do more checking if it remained concerned. The scout team contacted the city and reviewed a plat map, which indicated there was only one address for the property. Agent Pollock stated that Officer Donovan Lucas reported that the city planner indicated "there was no second residence on the home as far as they're concerned." *Id.* at 552. Agent Pollock added that "the owner was going to be contacted hopefully after the search warrant was executed and that they were living [in the detached structure] quote/unquote illegally is what I was told through [Officer Lucas]." *Id.* Officers Tyler Kotter, Aiveni Taufu, and Lucas of the scout team drafted the SERT/SWAT Operation Order that Agent Pollock approved. The order described a "single family *dwelling with detached garage/residence*." *Id.* at 731 (emphasis added). In his deposition, Officer Lucas testified the term garage/residence was used because the team members "weren't sure" whether someone was living there. *Id.* at 824. He acknowledged that "if there's a secondary address on [the warrant], then we really shouldn't execute the continuation of the warrant." *Id.* at 823.

The Operations Order continued as follows:

> Left stick will be the entry stick for *residence # 1* and the right stick will be the entry stick for the *residence # 2* . . . . At driveway, left stick will slow to allow right stick to get into the back of the residence to simultaneously enter the two buildings. Left stick will then proceed to the white [sic] side of *residence # 1* and prepare to breach the front door (single door knob right hinged left). . . . Right stick will then proceed to the white [sic] side of *residence # 2* and prepare to breach the front door *residence # 2*, ... Two other officers will port [sic] and cover the 2-2 windows on the black [sic] side of *residence # 2* once the primary entry of *residence # 2* has been breached. Both sticks will enter their respective buildings and secure and clear the residences.

Id. at 734 (emphasis added). The Operations Order designated the back side of residence # 2 a "danger area" because motion lights in the commercial storage bordered the back side of the property. *Id.*

5. The Execution of the Warrant

On February 12, 2003, at approximately 12:30 a.m., Agent Pollock and Sergeant Barnett met with the SERT/SWAT team at a parking lot close to the house. The SERT/SWAT team departed to execute the warrant, while Agent Pollock and Sergeant Barnett waited behind for confirmation regarding the securing of the area.

The SERT/SWAT team divided into two units: the "right stick" for the house and the "left stick" for the garage. At 12:46 a.m., the units simultaneously entered 44 West 2700 South and 44 1/2 West 2700 South. To enter the garage apartment, the team broke through a rear window, and also entered through the side door. The team members swarmed the garage apartment with their weapons drawn.

Ms. Harman and Mr. Overton were discovered sleeping, lying unclothed on a mattress. Ms. Harman was wearing only thong underwear; Mr. Overton was naked. The team members smelled burnt marijuana and saw marijuana and a pipe on the kitchen counter. The SERT/SWAT team gave the plaintiffs a single bed sheet, handcuffed them to the couch, and searched the premises. Ms. Harman contends that she was so terrified that she urinated on herself, and was not given the opportunity to clean herself. Plaintiffs contend that only after an hour of being handcuffed in the February cold air did male officers help them dress. The defendants maintain that a female officer assisted Ms. Harman and a male officer aided Mr. Overton.

After securing the property, the SERT/SWAT team radioed Agent Pollock and Sergeant Barnett. Sergeant Barnett testified that "when [he] walked in the door, [the plaintiffs] were sitting on the couch." *Id.* vol. III, at 1150. He testified that the residence "appeared it could have been" a "separate residence," noting the counter and small kitchen. *Id.* at 1147. He "wasn't sure" whether the plaintiffs were involved in the drug ring. *Id.* at 1150. Despite his doubts, Sergeant Barnett returned to 44 West 2700 South to assist the processing of the suspects there.

After about thirty minutes, Sergeant Barnett returned to question the plaintiffs individually. The plaintiffs had been moved to a van holding suspects from 44 West 2700 South. Sergeant Barnett spoke to each plaintiff for about fifteen to twenty minutes. Ms. Harman repeatedly requested to see the search warrant. The plaintiffs told Sergeant Barnett that they had moved into the residence a few weeks earlier and were not involved with the drug trafficking at the 44 West 2700 South residence. Sergeant Barnett testified that upon completion of the interviews, he "felt certain" the garage apartment was a separate residence. *Id.* at 1149.

Agent Pollock did not interact with the plaintiffs. To apparently conceal his identity, Agent Pollcok testified that, upon returning to 44 West 2700 South, he donned a Balaclava, a type of head gear that covers the whole head. He then remained in front of the house in the shadows near some bushes and viewed the goings on from there. Agent Pollock did not recognize either Ms. Harman or Mr. Overton, but thought their features may have been consistent with purchasers of drugs from 44 West 2700 South. The district court concluded that Agent Pollock entered 44 1/2 West 2700 South after the plaintiffs' removal. While there, "he conducted a quick search for weapons or drugs." *Id.* at 1321.

Sergeant Barnett then told Lieutenant Michaud, who was in charge, that plaintiffs were not involved in the drug trafficking at 44 West 2700 South. Lieutenant Michaud gave the plaintiffs citations for possession of marijuana and paraphernalia, and they were released at 2:35 a.m.

Ms. Harman and Mr. Overton filed a complaint under 42 U.S.C. § 1983, alleging that Agent Pollock and Sergeant Barnett violated their Fourth Amendment rights (1) to be free of unreasonable searches, and (2) to be free from unreasonable detentions. The district court concluded that the officers were entitled to qualified immunity because (1) the entry into the garage apartment was objectively reasonable, and (2) the subsequent detention was also reasonable. For the reasons given below, we affirm in part and reverse in part.

II. DISCUSSION

Ms. Harman and Mr. Overton allege a deprivation of their Fourth Amendment rights to be free from unreasonable searches and seizures. First, they contend that the officers' entry into their residence violated the Fourth Amendment. Second, they contend that their continued detention was also a violation of their Fourth Amendment rights. We hold that the initial entry into the home was an objectively reasonable mistake, although the officers learned quickly of the extent of and reasons for the mistaken entry. Thus we affirm the district court's grant of summary judgment on the first contention. As to the continued detention of the plaintiffs, we hold that there exist material factual disputes as to the reasonableness of the defendants' actions, and we reverse the district court's grant of summary judgment to the defendants.

A. Standard of review

> We review a grant of summary judgment on the basis of qualified immunity *de novo*. Summary judgment is appropriate if the pleadings,

> depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and one party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c). We construe the record in the light most favorable to the non-moving party.

Jiron v. City of Lakewood, 392 F.3d 410, 413-14 (10th Cir. 2004) (citation omitted). There is a genuine issue of material fact if the nonmoving party presents facts such that a reasonable jury could find in favor of the nonmoving party. *Simms v. Okla. ex rel. Dep't of Mental Health & Substance Abuse Servs.*, 165 F.3d 1321, 1326 (10th Cir. 1999). "If there is no genuine issue of material fact in dispute, we determine whether the district court correctly applied the substantive law." *Id.*

In a case such as this one, where a defendant invokes qualified immunity, the plaintiffs "must show that (1) the official violated a constitutional or statutory right; and (2) the constitutional or statutory right was clearly established when the alleged violation occurred." *Mimics, Inc. v. Village of Angel Fire*, 394 F.3d 836, 841 (10th Cir. 2005) (internal quotation marks omitted). We "must first determine if a constitutional right was violated because 'in the course of determining whether a constitutional right was violated on the premises alleged, a court might find it necessary to set forth principles which will become the basis for a holding that a right is clearly established.'" *Id.* at 842 (quoting *Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001)).

"Requiring the law to be clearly established provides defendants with 'fair warning' that their conduct is unconstitutional." *Id.* at 842 (quoting *Hope v. Pelzer*, 536 U.S. 730, 739-40, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002)). "'The law is clearly established when a Supreme Court or Tenth Circuit decision is on point, or if the clearly established weight of authority from other courts shows that the right must be as plaintiff maintains.'" *Id.* (quoting *Roska v. Peterson*, 328 F.3d 1230, 1248 (10th Cir. 2003)). To be clearly established,

> the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

Anderson v. Creighton, 483 U.S. 635, 640, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987) (citation omitted). Thus, qualified immunity leaves "ample room for mistaken judgments," *id.* at 341, and protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986). The parties do not dispute that "the law in this area was well-established at the time of the search in question." *Peterson v. Jensen*, 371 F.3d 1199, 1203 (10th Cir. 2004) (citing *Maryland v. Garrison*, 480 U.S. 79, 87, 107 S. Ct. 1013, 94 L. Ed. 2d 72 (1987); *Pray v. City of Sandusky*, 49 F.3d 1154, 1159 (6th Cir. 1995)("Any search or seizure that took place after the officers knew or reasonably should have

known that they were in the wrong residence would no longer be protected by qualified immunity.").

B. The initial entry into 44 1/2 West 2700 South

1. The warrant sufficiently described the areas to be searched.

The Fourth Amendment to the United States Constitution provides in part that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV. ""The test for determining the adequacy of the description of the location to be searched is whether the description is sufficient to enable the executing officer to locate and identify the premises with reasonable effort, and whether there is any reasonable probability that another premise might be mistakenly searched.'" *United States v. Lora-Solano*, 330 F.3d 1288, 1293 (10th Cir. 2003) (quoting *United States v. Pervaz*, 118 F.3d 1, 9 (1st Cir. 1997)).

The plaintiffs first contend that the warrant's factual inaccuracies, resulting in part from Agent Pollock's omissions and unreasonable inferences, rendered the warrant invalid. The warrant described the premises to be searched as follows:

> the premises known as: 44 West 2700 South, South Salt Lake City, Utah, a white house, brown roof, front door faces south, small wood fence to the west of the door across the front, # 44 on the wall to the right of the front door, a

> detached garage to the rear of the house on the east side.

Aplts' App. vol. II, at 723.

Despite plaintiffs' protestations to the contrary, our precedent suggests that the warrant sufficiently described the area to be searched. We have upheld warrants like the one at issue where one part of the description is inaccurate, but the description has other accurate information to identify the place to be searched with particularity. *See Lora-Solano*, 330 F.3d at 1293. "A technically wrong address does not invalidate a warrant if it otherwise describes the premises with sufficient particularity so that the police can ascertain and identify the place to be searched." *Id.*; *cf. United States v. Williamson*, 1 F.3d 1134, 1136 (10th Cir. 1993) (invalidating a warrant that designated a rural mail box nine miles away from the premises that were searched, where the government argued unsuccessfully that the executing officer's knowledge of the actual location of the business alone cured the defective warrant).

"With the benefit of hindsight, . . . we now know that the description of that place was broader than appropriate . . . ." *Garrison*, 480 U.S. at 85. In *Garrison*, the officers realized, after their initial entry, that the description in the warrant was overbroad. The warrant encompassed the entire third floor of an apartment building, while the officers assumed there was only one apartment on that floor. In fact there were two apartments. The Court instructed that "we must judge the constitutionality of their conduct in light of the information available to them at the time they acted.

Those items of evidence that emerge after the warrant is issued *have no bearing upon whether or not a warrant was validly issued.*" *Id.* (emphasis added).

We do acknowledge that the omission of the garage residence's actual address was more than a mere clerical error. "The requisite specificity of the description . . . depends heavily on the facts of each case." *United States v. Dorrough*, 927 F.2d 498, 500 (10th Cir. 1991). Here, although the address given in the warrant was not the address of the garage residence, "the description of the premises to be searched . . . still described the same piece of property." *United States v. Gitcho*, 601 F.2d 369, 371-72 (9th Cir. 1979) (warrant met particularity requirement even though it misstated address of premises because the address, though technically incorrect, was reasonable for the location intended; the agents executing the warrant personally knew which premises were intended to be searched; and the premises which were intended to be searched were those actually searched).

Despite some inconsistencies in the legal title research, the affidavit and warrant provided accurate physical descriptions of the structures to be searched: "a white house, brown roof, front door faces south, small wood fence to the west of the door across the front, # 44 on the wall to the right of the front door, a detached garage to the rear of the house on the east side." Aplts' App. vol. II, at 723. As explained more fully below, perhaps there were indications suggesting different residences at 44 and 44 1/2 West 2700 South. Despite these inaccuracies, Agent Pollock, through surveillance, had personal knowledge of the physical description of the structures to be searched. *See Gitcho*, 601 F.2d at

372 (upholding search warrant in part where "the agents executing the warrant personally knew which premises were intended to be searched, and those premises were under constant surveillance while the warrant was obtained").

Another factor supporting the warrant's descriptive sufficiency is "that the premises which were intended to be searched had previously been surveilled or were being surveilled while the warrant was obtained." *Id.* For these limited purposes, we hold that the warrant described the premises to be searched with sufficient particularity.

2. The warrant did not omit or misstate material information.

Next, we consider the plaintiffs' suggestion that Agent Pollock intentionally omitted and misstated material information in his affidavit in support of the search warrant. The omission of the garage residence's address from the affidavit supporting the application for the warrant "was clearly not an instance of 'a police officer making false statements in an affidavit supporting a search warrant knowingly or with reckless disregard for the truth.'" *Lora-Solano*, 330 F.3d at 1295 (quoting *United States v. Tuter*, 240 F.3d 1292, 1299 (10th Cir. 2001) (citing *Franks v. Delaware*, 438 U.S. 154, 155-56, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978))).

"The validity of the warrant must be assessed on the basis of the information that the officers disclosed, or had a duty to discover and to disclose, to the issuing Magistrate." *Garrison*, 480 U.S. at 85. Agent Pollock identified the existence of a separate garage. He

conferred with the District Attorney's office and relied upon the information supplied by Mr. Gomez, which indicated that the property included a single family home with a detached garage and a "finished main floor." Aplts' App. vol. II, at 563. On the basis of the information presented to Agent Pollock, we agree with the district court that the warrant, insofar as it authorized a search that turned out to be overbroad in scope, was valid when it issued. No evidence supports the plaintiffs' suggestion that Agent Pollock knowingly and intentionally misstated and excluded material information regarding the detached structure in his affidavit in support of the application for a warrant.

3. The officers were reasonably mistaken when they initially entered 44 1/2 West 2700 South.

Having held that the warrant's overbroad verbiage did not, standing alone, render the warrant invalid, we consider the much closer legal question of whether the officer's initial entry into the separate residence at 44 1/2 West 2700 South was reasonable. Plaintiffs contend that the agents' actions were unreasonable given the information known to them. The district court concluded that the "Defendants' mistake was objectively reasonable." *Id.* vol. IV, at 1320. "Agent Pollock reasonably relied on the investigation of Mr. Gomez. His reliance was strengthened by the information given him by the members of the scout team." *Id.*

In so finding, the district court summarized the factors it considered in support of the plaintiffs and the defendants. As to the entry into 44 1/2 West 2700 South, the district court found the following evidence supported the plaintiffs:

1. The main residence had two mailboxes on the front.
2. Agent Pollock never saw suspects go in or out of the garage apartment.
3. The Salt Lake County records indicated that in addition to the single family residence, there was a outbuilding consisting of a garage and a finished main floor.
4. A deed of trust showed two addresses given for the property: 44 West 2700 South and 44 1/2 West 2700 South.
5. 44 1/2 West 2700 had a Questar Gas account.
6. The United States Postal Service had the 44 1/2 West 2700 South address listed in its database.
7. The phone company sent bills to the 44 1/2 West 2700 South address.
8. The plat indicated two lots.
9. The plaintiffs' vehicles parked on the property were not those seen being used by Pawoo and Isabel.
10. The outbuilding had pipes from the roof, a door and a window that looked "residential," and a light and mailbox situated near the door.
11. Members of the scout team told Agent Pollock that they were concerned that the officers knew the outbuilding might be used as a residence, or as something other than a garage, because there were reports of lights and voices and people coming and going.
12. The Operations Order listed the residence as "Single Family Dwelling with detached Garage/Residence" and often referred to "residence # 1" and "residence # 2."

Aplts' App. vol. IV, at 1317-18.

As to factors supporting the defendants, the district court listed:

> 1. Agent Pollock thought one of the two mailboxes on the front of 44 West 2700 South was for a newspaper.
> 2. No evidence shows that any of the officers noticed the pipes coming out of the back of the roof, or thought the door and window on 44 1/2 West 2700 South were signs of a residence.
> 3. Mr. Gomez's investigation did not reveal the 44 1/2 West address; he checked the Salt Lake County Recorder's Officer's records, which showed that 44 West 2700 South as a single family dwelling with one detached structure: a garage with a finished main floor.
> 4. Because Mr. Gomez did not know about the 44 1/2 West address, he did not check the Questar records for that address.
> 5. Mr. Gomez believed, after his review of all the records, that there was nothing to indicate that the outbuilding was being used as a residence. Mr. Gomez testified: "My research, there's no indication other than one single family dwelling."
> 6. Mr. Gomez told Agent Pollock: "The information that I would have relayed to him (Agent Pollock) is the owner of the property and that it shows a single family dwelling . . . . I identified to him single family dwelling."
> 7. After Agent Pollock encouraged members of the scout team to do their own investigation to verify whether there was a second residence, they "went to the South Salt Lake City planner

> and reviewed the city plan, a map of the area, and received information on the address. All of [their] research indicated this was a single occupied residence with one address. The garage was not a separate residence, but a part of the property at 44 West 2700 South."
> 8. Agent Pollock testified:" "I didn't have any suspicions that there was a secondary residence there ever except for the fact that my scout Donavan Lucas advised me that they had gone to the planner's office to see if possible there was a secondary residence on the home. And when I asked him, he said no, and that confirmed the information that Joe Gomez gave me that there was not a secondary residence on the property."

Id. at 1318-19 (citations omitted).

The plaintiffs insist that, based on the above, "no reasonable officer could possibly believe [their] home was merely a garage." Aplts' Br. at 47. In addition to the evidence and testimony weighing in their favor as noted by the district court, they emphasize that the following factors clearly indicate to a reasonably competent officer that the detached structure was a residence:

- the simultaneous raids of "residence # 1" and "residence # 2,"
- the *three* separate mailboxes (two on 44 West 2700 South and one on 44 1/2 West 2700 South),
- the deed of trust,
- the U.S. Postal Service records,

- the gas bill for 44 West 2700 South in Ms. Harman's name,
- the scout team's inspection of the front door hinges, and presumably, the residential type front door and the porch, porch light, rug etc. on 44 1/2 West 2700 South,
- the residential windows on 44 1/2 West 2700 South.
- the New Mexico license plates on Ms. Harman's car,
- the cement walkway and landscaping, and
- . separate telephone service.

The defendants counter that, even had they been able to observe the purported porch, porch lights, cement pad, and steps, their existence would have been inconsequential. Such features are commonly found on garages and similar outbuilding that are not used as dwellings.

As to SWAT team member Officer Aiveni Taufa's examination of the garage door's hinges, the defendants maintain that the team was merely determining which way the side door opened, so as to execute the warrant as safely and effectively as possible. Officer Taufa testified he saw the door and the purported porch light, but did not recall seeing the mailbox or the rug. The defendants maintain that Officer Taufa's failure to notice these items does not render the initial entry unreasonable. Similarly, the defendants argue that the number of vehicles on the property was consistent with the suspects' known use of the property: numerous

different vehicles frequently came and went from drug houses.

Particularly at summary judgment, this matter is close, but after considering all of the above factors, and the arguments supporting and against each of them, we agree with the district court that Sergeant Barnett and Agent Pollock reasonably relied upon the information supplied by Mr. Gomez. Although there was a possibility of a separate residence, the information supplied by Mr. Gomez and the scout team's independent verification that the property contained only one residence confirmed Agent Pollock's information supplied in his affidavit.

We therefore reject the plaintiffs' suggestion that Sergeant Barnett and Agent Pollock acted unreasonably based on the information before them. The *Garrison* court ultimately decided that "the officers' conduct was consistent with a reasonable effort to ascertain and identify the place intended to be searched within the meaning of the Fourth Amendment." 480 U.S. at 88-89. In *Garrison*, "the objective facts available to the officers at the time suggested no distinction between [the] apartment and the third-floor premises." *Id.* at 88. The same reasoning applies here to 44 West 2700 South and 44 1/2 West 2700 South. Accordingly, after a thorough review of the record, we agree with the district court that upon the initial entry into 44 1/2 West 2700 South, the SERT/SWAT team had reason to believe that the separate detached garage was not a separate residence. Given the facial validity of the warrant, the officers permissibly entered the separate residence.

C. Material factual disputes exist as to the reasonableness of the subsequent search and detention of Ms. Harman and Mr. Overton.

Having determined that the initial entry into 44 1/2 West 2700 South was reasonable, we must consider whether the defendants, upon realizing the mistaken execution of the warrant, acted reasonably in their subsequent execution of the search warrant and detention of the plaintiffs, which is required for the grant of summary judgment on qualified immunity grounds. The district court found that "although Plaintiffs told [Sergeant] Barnett that theirs was a separate residence and they had no connection with the 44 West address, [he] acted reasonably in investigating further before he accepted their story." Aplts' App. vol. IV, at 1322. Relying on *Peterson v. Jensen*, 371 F.3d 1199, 1203 (10th Cir. 2004), the district court determined that Sergeant "Barnett released the Plaintiffs after he had spoken to the occupants of [44] West 2700 and confirmed that the Plaintiffs had no connection to them." Aplts' App. vol. IV, at 1323.

Ms. Harman and Mr. Overton contend that the officers did not terminate the search and detention upon realizing that the SERT/SWAT had raided a separate residence with occupants unrelated to the suspects in the main house. Thus, the search and detention exceeded the scope of the warrant. According to the plaintiffs, the immediate discovery of a separate residence and occupants bearing no resemblance to any of the suspects would have informed any reasonable officer of the mistake. [1]

The officers argue that: (1) relying on *Garrison* and *Peterson*, Sergeant Barnett could not have realized the warrant was overbroad until he interviewed the occupants of the 44 West 2700 South, and Ms. Harman and Mr. Overton; (2) they had authority to detain the plaintiffs merely because they were occupants on the premises; (3) the discovery of contraband provided independent probable cause to detain the plaintiffs; and (4) the officers had probable cause to detain, arrest, and incarcerate the plaintiffs. Because the district court granted summary judgment on the first argument, it did not make did not consider whether the evidence was uncontroverted as to the remaining arguments.

1. Realization that the warrant was overbroad.

The officers maintain that the district court's application of *Peterson* was correct and that they acted reasonably in holding the plaintiffs and searching the garage apartment. As noted above, the Supreme Court in *Garrison* held that police officers do not necessarily violate the Fourth Amendment when they mistakenly execute a search warrant on the wrong address. "The [Supreme] Court has . . . recognized the need to allow some latitude for honest mistakes that are made by officers in the dangerous and difficult process of making arrests and executing search warrants." 480 U.S. at 87. In this vein, the Court noted that, the officers "were required to discontinue the search of respondent's apartment *as soon as they*. . . were put on notice of the risk that they might be in a unit erroneously included within the terms of the warrant." *See id.* (emphasis added). "The validity of the search of [the plaintiff's] apartment . . . depends on whether the officers' failure

to realize the overbreadth of the warrant was objectively understandable and reasonable." *Id.* at 88.

Garrison requires that the officers were obligated to retreat as soon as they knew or reasonably should have known that there was a mistake, i.e., they were in the wrong residence. *See id.* at 87-88. The Court emphasized that the officers "were required to discontinue the search of respondent's apartment as soon as they discovered that there were two separate units on the third floor and therefore *were put on notice* of the risk that they might be in a unit erroneously included within the terms of the warrant." *Id.* (emphasis added).

In *Peterson*, relied upon by the district court, the panel affirmed the district court's denial of the defendant-officers' motion to dismiss. There, the officers entered a residence in search of two suspects. The suspects no longer occupied the residence. The residents of the apartment alleged that they were searched and interrogated even after they identified themselves. 371 F.3d at 1202-03.

The panel held that, given the procedural posture of the case, where it must take all well-plead allegations as true, the plaintiffs alleged a constitutional violation. The panel noted, however, that, "the search became unconstitutional only if it continued after the defendants realized, or reasonably should have realized, that the people named in the warrant as occupants of the apartment no longer resided there." *Id.* at 1203 (citing *Garrison* 480 U.S. at 88). We agree with the district court that *Peterson*'s instructions in this regard

are helpful, but we diverge because material facts still in dispute here preclude summary judgment.

The Sixth Circuit's ruling in *Pray v. City of Sandusky*, 49 F.3d 1154 (6th Cir. 1995) is particularly instructive to show why material facts are still in dispute. In *Pray*, an elderly married couple brought a civil rights suit under § 1983 against various police officers and a municipality alleging an illegal search and seizure and excessive force in violation of the Fourth Amendment. There, the police gathered information for a warrant to search the upper apartment of a duplex, and arrived at the residence to execute that warrant. This was the second search warrant for this upper apartment. A first warrant for the upstairs apartment had been executed six weeks earlier. At least one of the officers present at the first raid was also present at the second raid. *Id.* at 1156.

The Prays' home was on the lower level of the duplex containing a common vestibule with one door opening immediately to a flight of ascending stairs where the upper apartment was accessed, and one door opening directly into the lower apartment where the Prays lived. "Neither door in the vestibule was identified by number or name." *Id.* The officers held a "pre-raid" briefing to review the layout of the building and plan the execution of the second warrant. The officer or officers present at the previous raid knew that the correct apartment would be accessed after climbing a flight of stairs.

In executing the warrant, the officers' team knocked on "what it considered the 'obvious' door" and, after receiving no immediate response, forced the door open;

the door turned out to be the door leading to the Prays' apartment. *Id.* at 1157. The officers then swarmed through the apartment; they confronted Mr. Pray at gunpoint, and pushed him to the floor; another officer discovered Mrs. Pray and pushed her to the ground; the officers remained for about five minutes securing and searching the residence. After finding nothing, the officers proceeded to the upstairs apartment which was the correct object of the search warrant. *Id.* at 1157.

As to the detention, the Sixth Circuit rejected the defendants' qualified immunity defense, noting the plaintiffs' testimony that "despite knowing that they were in the wrong place, the defendants nevertheless 'secured' the Pray residence for an additional four to five minutes." *Id.* at 1160. Given this testimony, the court held that it was "for the trier of fact to determine, based on the credibility of the evidence before it, at what point the officers knew or reasonably should have known they were at the wrong residence, and to determine what searches and seizures occurred after that." *Id.*; *see also Liston v. County of Riverside*, 120 F.3d 965, 977 (9th Cir. 1997) (finding "'triable issues' regarding the reasonableness of the detention, particularly as to whether it continued after the officers knew or a reasonable officer would have known that a serious mistake had been made").

The Fifth Circuit reached a similar conclusion in *Simmons v. City of Paris*, 378 F.3d 476, 481 (5th Cir. 2004). In *Simmons*, the police officers executed a valid search warrant upon the wrong address: the search warrant was for 400 N.W. 14th Street, and plaintiffs were residents of 410 N.W. 14th Street.

> When the entry team members assembled into a single file line, two of the plaintiffs, Charlotte and Dustin Handley, were on their front porch. Seeing Ms. Handley and her son on the front porch, Officer McFadden sprinted toward them, and the rest of the entry team followed. Charlotte and Dustin, not realizing who the officers were, quickly retreated back inside their home. Officer McFadden followed Ms. Handley into her house through the still open front door. He immediately detained Ms. Handley and Mr. Simmons in the front room. The other members of the entry team followed Officer McFadden into the house and detained the children, Dustin and Angelica, either in Angelica's bedroom or the kitchen.
>
> The officers quickly realized they were in the wrong home. In fact, at least two of the officers behind Officer McFadden knew that they were approaching the wrong house, but they thought perhaps Officer McFadden had seen the suspected drug dealer run into the Handley home and that he was in pursuit. The district court found that there *were factual disputes as to how long the officers remained in the Handleys' house and whether the officers continued searching the residence after they knew it was the wrong house.*

Id. at 478 (emphasis added). The Fifth Circuit affirmed the district court's denial of summary judgment for those defendants who entered the home. *Id.* at 481-82.

> Qualified immunity does not provide a safe harbor for police to remain in a residence after they are aware that they have entered the wrong residence by mistake. A decision by law enforcement officers to remain in a residence after they realize they are in the wrong house crosses the line between a reasonable mistake and affirmative misconduct that traditionally sets the boundaries of qualified immunity.

Id. at 481.

Here, the record indicates that the defendants knew early on, that is, before the SERT/SWAT team entry, there was a *possibility* that the garage was a separate residence. Agent Pollock met with the district attorney who raised the presence of possible indicia on the garage of a separate residence, such as a separate address or a separate mailbox. He stated that he knew there was "something" attached to the house -- but that he did not know if it was original. He "thought maybe it was possibly a little workshop." Aplts' App. vol. II, at 556. Agent Pollock acknowledged that he saw the plaintiffs, and that they did not resemble the suspects, who were of Hispanic descent.

Sergeant Barnett acknowledged he was aware of a "possibility" of a second residence before the execution of the search. *Id.* vol. III, at 1149. According to Sergeant Barnett, this possibility became a strong suspicion when he entered the garage, and was confirmed after interviewing the plaintiffs and those suspects detained in 44 West 2700 South. *Id.* From the time he entered the garage, he did not suspect the plaintiffs "to be part of the known characters in the

investigation." *Id.* vol. II, at 604. Rather than allay his suspicion, Sergeant Barnett opted to focus on the suspects at 44 West 2700 South.

Each of the officers had ample notice that the garage may have been a separate residence. *See Garrison*, 480 U.S. at 87. Neither plaintiff resembled any target described in the warrant or the underlying affidavit. Therefore, we conclude that there are material facts in dispute as to the reasonableness of the officers' delay in realizing that they were at a separate residence not anticipated in the warrant. In addition, factual disputes exist as to whether the full scale search took place after the officers should have realized they were in the wrong residence.

2. Limited authority to detain the plaintiffs

Next, the officers argue that, under *Michigan v. Summers*, 452 U.S. 692, 705, 101 S. Ct. 2587, 69 L. Ed. 2d 340 (1981), and *Muehler v. Mena*, 544 U.S. 93, 125 S. Ct. 1465, 161 L. Ed. 2d 299 (2005), they justifiably detained the plaintiffs. *Summers* states that "a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a *proper* search is conducted." 452 U.S. at 705 (emphasis added). According to the officers, they "could potentially hold Plaintiffs in handcuffs for two to three hours without violating the fourth amendment." Aples' Br. at 43.

In *Summers*, the officers were about to execute a search warrant upon the suspect's home. The suspect was descending the front steps at the time. After he assisted the officers in gaining entry, the officers

detained him while they conducted the search. The court concluded that the detention of the suspect was reasonable: "If the evidence that a citizen's residence is harboring contraband is sufficient to persuade a judicial officer that an invasion of the citizen's privacy is justified, it is constitutionally reasonable to require that citizen to remain while officers of the law execute a valid warrant to search his home." *Summers*, 452 U.S. at 704-05. Unlike *Summers*, where "it was lawful to require [the defendant] to re-enter and to remain in the house until evidence establishing probable cause to arrest [the defendant] was found," here, the officers detained the plaintiffs during the execution of what had become a questionably valid warrant. *Id.* at 705. Also, unlike in *Summers*, here, the officers removed the plaintiffs, who were unclothed or barely clothed, from their bed, and forced them to sit handcuffed on the couch during the execution of the overbroad warrant.

In *Muehler*, during a SWAT team raid of 1363 Patricia Avenue, officers handcuffed and detained Ms. Mena, who was found asleep in her bed at that location. The Court held Ms. "Mena's detention for the duration of the search was reasonable under *Summers* because a warrant existed to search 1363 Patricia Avenue and she was an occupant of that address at the time of the search." *Muehler*, 125 S. Ct. at 1470.

Neither *Summers* nor *Muehler* is applicable to this case. First, in neither Supreme Court case was the validity of the underlying warrant at issue. Here, the officers concede the warrant was overbroad. Second, the officers concede that, "as with any authority bestowed by a search warrant, be it categorical or otherwise, that authority terminates when an officers

knows or reasonably should know that the warrant is overbroad." Aple's Br. at 43. As established above, we have determined that there are material facts in dispute as to the reasonableness of the lengthy detention of the plaintiffs and when the officers' authority terminated. Accordingly, we reject the officers' argument that under *Summers* and *Muehler*, the detention was unquestionably justifiable.

3. Presence of contraband

Finally, Sergeant Barnett and Agent Pollock argue that the detention was reasonable because once the officers observed contraband in plain view, they had a lawful right to seize the marijuana without a warrant. They contend that they had probable cause to believe that "Plaintiffs were involved in illegal drugs related to the criminal activity for which the warrant had *been* issued." Aples' Br. at 45. In addition, the plaintiffs admitted the marijuana and pipe belonged to them.

The officers have not argued that the plaintiffs' continued detention was supported by independent reasons developed during the initial stages of the detention, *e.g.*, to investigate marijuana possession unrelated to the raid on the main dwelling. They argue that the presence of marijuana suggested the plaintiffs were connected "to the criminal activity for which the warrant had been issued." *Id.* at 45.

The officers acknowledge that the small amount of contraband standing alone was insufficient to suggest drug trafficking, and that marijuana was not a drug specified in the affidavit supporting the warrant, which specified cocaine and heroin. Sergeant Barnett agreed

that from the time he entered the garage, he did not suspect the plaintiffs "to be part of the known characters in the investigation." Aplts' App. vol. II, at 604. There is nothing in the record to suggest that the questioning of the plaintiffs or other suspects somehow related to the discovered marijuana. Further, the officers merely issued a citation at the end of the encounter, which suggests that usual police procedures would not have encompassed the handcuffing and detention of the plaintiffs. Notwithstanding these admissions, the officers contend that the contraband provided independent probable cause of related drug activity, which justified the full scale search and detention of the plaintiffs.

"The plain view doctrine authorizes seizure of illegal or evidentiary items visible to a police officer whose access to the object has some prior Fourth Amendment justification and who has probable cause to suspect that the item is connected with criminal activity." *Illinois v. Andreas*, 463 U.S. 765, 771, 103 S. Ct. 3319, 77 L. Ed. 2d 1003 (1983). "It is true that the 'plain view' doctrine introduces some play into the joints." *Hessel v. O'Hearn*, 977 F.2d 299, 302 (7th Cir. 1992). "Of course, if the police officers' presence in the home itself entailed a violation of the Fourth Amendment, no amount of probable cause to believe that an item in plain view constitutes incriminating evidence will justify its seizure." *Soldal v. Cook County, Ill.*, 506 U.S. 56, 66 n.10, 113 S. Ct. 538, 121 L. Ed. 2d 450 (1992).

As the Supreme Court explained:

> What the 'plain view' cases have in common is that the police officer in *each of them had a prior*

> *justification for an intrusion* in the course of which he came inadvertently across a piece of evidence incriminating the accused. *The doctrine serves to supplement the prior justification*—whether it be a warrant for another object, hot pursuit, search incident to lawful arrest, or some other legitimate reason for being present unconnected with a search directed against the accused—and permits the warrantless seizure.

Horton v. California, 496 U.S. 128, 135-36, 110 S. Ct. 2301, 110 L. Ed. 2d 112 (1990) (emphasis added) (quotation marks omitted).

We recognize that "it is only after the police begin to execute the warrant and set foot upon the described premises that they will discover the factual mistake and must reasonably limit their search accordingly." *Garrison*, 480 U.S. at 89 n.14. Although the officers were acting under the auspices of what they believed to be a valid warrant, we have determined that material facts remain in dispute as to the reasonableness of the detention of the plaintiffs and search of the garage apartment. The Supreme Court consistently reminds us that "[a] generalized interest in expedient law enforcement cannot, without more, justify a warrantless search." *Georgia v. Randolph*, 547 U.S. 103, 126 S. Ct. 1515, 164 L. Ed. 2d 208, 2006 WL 707380, at *8, n.5 (March 22, 2006); *see Coolidge v. New Hampshire*, 403 U.S. 443, 481, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971)("The warrant requirement . . . is not an inconvenience to be somehow 'weighed' against the claims of police efficiency").

As noted above, the plaintiffs did not resemble the suspects as described in the warrant. The plaintiffs consistently denied any involvement with the residents of 44 West 2700 South. Despite building possibilities of a problem, the plaintiffs were placed in a van with suspects from 44 West 2700 South and questioned about their involvement with those suspects. Sergeant Barnett interviewed Ms. Harman, Mr. Overton, and the suspects from 44 West 2700 South before releasing the plaintiffs.

While we acknowledge that some portion of the detention may have been justified based on the presence of a small amount of marijuana, the district court did not reach this argument, and thus we have no factual findings or credibility determinations on this matter from the district court. In addition, the parties do not address the sizeable difference between seizing a person or property in an open area, and the seizing of property or persons "situated on private premises to which access is not otherwise available for the seizing officer." *Payton v. New York*, 445 U.S. 573, 587, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980). The officers at no time considered obtaining a separate warrant. *Randolph*, 126 S. Ct. 1515, 164 L. Ed. 2d 208, 2006 WL 707380, at *9 (underscoring "general partiality toward police action taken under a warrant [as against] searches and seizures without one") (internal quotation marks omitted). Nor does the record at this point disclose any reason such as officer safety or the well being of the plaintiffs during the course of the raid that would support further detention until the entire premises were secured. We are also mindful that the governmental interest implicated by the particular criminal prohibition at issue in this case appears to be

relatively minor, as the officers issued a citation for a misdemeanor. Moreover, the officers point to nothing in the record to justify the officers' full-scale search of plaintiffs' garage apartment.

Accordingly, we hold that, based on the record before us, material facts are also in dispute as to the reasonableness of the lengthy detention and the full-scale search of the garage apartment. *Cf. Pray*, 49 F.3d at 1160 (determining trier of fact must determine reasonableness of officers' action when they secured residence "for an additional four to five minutes"). The district court may make further findings on this claim. Should the trier of fact decide that the detention was unlawful, it may be necessary for a jury to determine what portion of the plaintiffs' injuries was proximately caused by the unlawful detention and the lawful citation. *See e.g. Bodine v. Warwick*, 72 F.3d 393, 400-01 (3d. Cir. 1995) (noting that if jury decides troopers' actions were unlawful, "it will be necessary to determine how much of the injury suffered by [plaintiff] was 'proximately' or 'legally' caused by the illegal entry").

We reiterate that "the privacy of a person's home and property may not be totally sacrificed in the name of maximum simplicity in enforcement of the criminal law." *Mincey v. Arizona*, 437 U.S. 385, 393, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978) (acknowledging the right of police to respond to emergency situations "threatening life or limb" and indicating that police may conduct a warrantless search provided that the search is " 'strictly circumscribed by the exigencies which justify its initiation' ") (quoting *Terry v. Ohio*, 392 U.S. 1, 25-26, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)); *see also*

Wilson v. Layne, 526 U.S. 603, 610, 119 S. Ct. 1692, 143 L. Ed. 2d 818 (1999)("The Fourth Amendment embodies this centuries-old principle of respect for the privacy of the home."); *Payton*, 445 U.S. at 601 (emphasizing "the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic"). Based on the record before us, we must reject the officers' claim the detention of the plaintiffs for at least ninety minutes and the search of the garage apartment were reasonable.

4. Probable cause to detain and arrest

Finally, the officers maintain they had probable cause to detain and arrest the plaintiffs, relying on *Atwater v. City of Lago Vista*, 532 U.S. 318, 354, 121 S. Ct. 1536, 149 L. Ed. 2d 549 (2001) (stating that "if an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender"). To the extent the officers' brief raise arguments not raised in the trial court, we do not consider them. *See Young v. United States*, 394 F.3d 858, 861 n.2 (10th Cir. 2005) ("[The] general rule [is] that a federal appellate court does not consider an issue not passed upon below.") (quotation marks omitted). This argument was not raised before or ruled upon by the trial court, and we decline to address it here. We do note however, that, similar to the restrictions placed upon the officers' plain view argument when that view is within a person's home, such admonitions have "equal force when the seizure of a person is involved." *Payton*, 445 U.S. at 587. "A greater burden is placed . . . on officials who enter a home or dwelling without consent. Freedom from

intrusion into the home or dwelling is the archetype of the privacy protection secured by the Fourth Amendment." *Id.* (internal quotation marks omitted).

III. CONCLUSION

In the instant case, taking the plaintiffs' sworn allegations of fact and all reasonable inferences therefrom as true, as we must do in reviewing the denial of a summary judgment motion, the plaintiffs have sufficiently alleged violations of the Fourth Amendment right to be free from unreasonable searches and seizures.

We further conclude that there are material factual disputes about whether Agent Pollock and Sergeant Barnett acted reasonably in the continued search of the residence and detention of the plaintiffs. Accordingly, we hold that "it is for the trier of fact to determine, based on the credibility of the evidence before it, at what point the officers knew or reasonably should have known they were at the wrong residence, and to determine what searches and seizures occurred after that." *Pray*, 49 F.3d at 1160. The district court may make findings and hold additional hearings regarding officers' alternative arguments concerning the officers' authority to detain the plaintiffs, and the applicability of the plain view doctrine.

Accordingly, we AFFIRM the district court's grant of qualified immunity to defendants as to the plaintiffs' claim of an unreasonable entry into 44 1/2 West 2700 South. Because we conclude that there are material factual disputes about when the officers should have realized they were at a separate residence not

encompassed by the warrant, we REVERSE and REMAND the district court's grant of qualified immunity to the officers with respect to the plaintiffs' claims of an unlawful search and seizure.

Footnotes

1 In their Reply Brief, plaintiffs also suggest that the detention and search were carried out unreasonably, citing the degrading nature of the detention: plaintiffs "were removed from their bed without any clothing," Ms. Harman "was wearing thong underwear only," "forcing [the plaintiffs] into their living room to remain sitting handcuffed on their couch . . . is shocking," "the February air was freezing," Ms. Harman "was never given the opportunity to remove her soiled underwear or clean herself," resulting in "unnecessary degradation" inside and outside their home. Reply Br. at 26-28.

To the extent these facts were raised before the district court and in plaintiffs' opening brief as part of the alleged unreasonableness of the continued detention and search of 44 1/2 West 2700 South, and to the extent they are relevant to that inquiry, we shall consider them. We shall not consider a separate claim that the manner in which the search and detention were carried out was unnecessarily degrading, as that claim was not raised in the opening brief, however. *See Anderson v. U.S. Dep't of Labor*, 422 F.3d 1155, 1174 (10th Cir. 2005) (holding that "the failure to raise an issue in an opening brief waives that issue."). "Consistent with these principles is the general rule that 'appellate courts will not entertain issues raised for the first time on appeal in an appellant's reply brief.'" *Id.* (quoting *Headrick v.*

Rockwell Int'l Corp., 24 F.3d 1272, 1277-78 (10th Cir. 1994)).

No. 08-4068

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MELISSA HARMAN and JUSTIN OVERTON,
Plaintiffs - Appellants,

v.

BRENT POLLOCK, Officer, Department of Public Safety, State Bureau of Investigations, City of Salt Lake, State of Utah; SCOTT BARNETT, Officer, Department of Public Safety, State Bureau of Investigations, City of Salt Lake, State of Utah,
Defendants - Appellees.

12/30/09, Filed

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH. (D.C. No. 2:03-CV-558-DAK).

ORDER

Before HENRY, Chief Judge, BRISCOE and LUCERO, Circuit Judges. LUCERO, J., dissenting.

Pending before the court is appellants' "Petition for Rehearing En Banc" and the appellees' "Response to the Petition for Rehearing En Banc." The original panel that decided the appeal has voted to deny panel rehearing, with Judge Lucero voting to grant panel rehearing.

The petition for rehearing en banc and the response were transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, the petition for rehearing en banc is also denied.

Entered for the Court,
ELISABETH A. SHUMAKER, Clerk